89-975

Case No. ——

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

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ABID A. AL-MARAYATI
PETITIONER

v.

UNIVERSITY OF TOLEDO,
GLEN DRISCOLL,
KARL VEZNER,
and
SHARRON E. DOERNER
RESPONDENTS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI:

A. Whether a tenured professor of a state university may amend his complaint which was originally cast seeking relief pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 (e) et seq., in order to re-cast the complaint as one seeking relief in part against university officials under 42 U.S.C. Section 1983 in their individual capacities for damages when said amendment was sought two years and one (1) day after the filing of the original complaint.

B. Whether in a case arising out of Ohio, claims brought pursuant to 42 U.S.C. Section 1983 are properly governed by the residual four year personal injury statute of limitations contained in Ohio Revised Code Section 2305.09 in light of this Court's previous opinion in Owens v. Okure, ____ U.S. ____, 109 S.Ct. 573 (1989), and whether The United States Court of Appeals for the Sixth Circuit has in Browning v. Pendleton, 86 F.2d 989 (6th Cir. 1989) misapplied a two year statute of limitations for actions brought pursuant to 42 U.S.C. Section 1983 in Ohio.

C. Whether a tenured professor of a state university may amend his complaint which was originally cast seeking relief pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 (e) et seq., in order to re-cast the complaint as one seeking in part prospective injunctive relief against a state university and university officials acting in their official capacities despite claims that said claims were barred under the Eleventh Amendment to the United States Constitution.

D. Whether a District Court, in finding that claims sought to be alleged by a tenured professor of a state university are barred by the Eleventh Amendment to the United States Constitution under the principle of Sovereign Immunity is required to analyze relevant factors relating to its Sovereign Immunity finding and to examine whether the particular state has consented to suit and thus waived its claim to Sovereign Immunity and whether said district court's failure to do so constitutes grounds for a remand.

E. Whether a state university and/or university officials, in reprimanding a tenured professor for objecting in a memorandum to the promotion of a fellow faculty member on the basis, in part, of said fellow faculty member's civil rights record constitutes a retaliatory act in violation of Section 704 (a) of Title VII of the Civil Rights Act of 1964 notwithstanding claims by the state university and its officials that said tenured professor's conduct was disruptive.

PARTIES TO PROCEEDINGS BELOW

Professor Abid A. Al-Marayati, plaintiff-appellant below and petitioner herein is and has been since 1968 a member of the Department of Political Science of the University of Toledo. Dr. Al-Marayati, a former Departmental Chairman and a tenured full professor is a resident of Toledo, Ohio. His country of national origin is Iraq and he is a Shiite Muslim in his religious beliefs.

The defendant-appellee, University of Toledo, is a part of the Ohio State University system and was Dr. Al-Marayati's employer since 1968. Glen Driscoll, at the time of the filing of Dr. Al-Marayati's original complaint, was the president of the University of Toledo. Dr. Karl Vezner was an employee of the University of Toledo and then chairman of the Department of Political Science. Dr. Sharron Doerner was at the time of the filing of Dr. Al-Marayati's original complaint, a member of the Political Science Department of the University of Toledo and a former Chairman of the Department of Political Science.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Abid A. Al-Marayati, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on August 29, 1989. On September 22, 1989, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for rehearing which had been timely filed on September 12, 1989.

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OPINIONS BELOW

The August 29, 1989 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is sought to be reviewed was not recommended for publication in accordance with the Sixth Circuit's Local Rules. The decision is represented in the Separate Appendix to this petition at Appendix A, pp. A1 to A15. The prior opinion of the United States District Court for the Northern District of Ohio, Western Division, also reprinted in Appendix B at pp. A16 to A32, is an unreported decision. Interlocutory orders of the United States District Court for the Northern District of Ohio, Western Division have been set forth at Appendix D,

at pp. A34-A42; Appendix E at pp. A43-A47; Appendix F at pp. A48-A52; and Appendix G at pp A53-A55. All interlocutory orders are unreported.

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STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 29, 1989. On September 12, 1989, petitioner filed a timely petition for rehearing before the United States Court of Appeals for the Sixth Circuit. In its Order filed on September 22, 1989, the United States Court of Appeals for the Sixth Circuit denied petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1)

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STATUTORY PROVISIONS INVOLVED

The statutes involved as set forth in Appendix I at pp. A57 et seq.

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STATEMENT OF THE CASE

This petitioner challenges the judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a judgment by the United States

District Court for the Northern District of Ohio in favor of respondents in an action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 (e) et seq. Key to this challenge are two interlocutory orders of the United States District Court for the Northern District of Ohio. At Appendix F, pages A48-A52 is a Memorandum and Order of the District Court filed on August 5, 1987 which denies petitioner's Motion for leave to amend his complaint in order to substitute 42 U.S.C. Section 1983 for 42 U.S.C. Section 2000 (e) as the theory of liability. Petitioner had sought to make one new factual allegation in the amended complaint, to add the then present president of the University of Toledo as a new party defendant, to name all defendants in their individual and official capacities, to add a jury demand, and to predicate a prayer for attorney's fees on 42 U.S.C. Section 1988. In an earlier interlocutory Memorandum and Order filed on February 21, 1986, discrimination which occurred outside of the 300 day filing period was held time barred. Petitioner's case proceeded to a non-jury trial commencing on February 16, 1988. On June 21, 1988, the District Court filed its Findings of Fact and Conclusions of Law finding that plaintiff was not entitled to relief under 42 U.S.C. Section 2000 (e) - 3 (a) et seq. and ordering that judgment be entered in favor of defendant and against plaintiff with costs to defendants dismissing this case on June 27, 1988. (Appendix B at pp A16-A32). An appeal followed to the United States Court of Appeals for the Sixth Circuit which affirmed the

Decision of the District Court in all respects. (Appendix A at pp. A1-A15)

Professor Abid A. Al-Marayati was born in Baghdad, Iraq on October 14, 1931. Dr. Al-Marayati is a Shiite Muslim by religious persuasion and practice. Dr. Al-Marayati became a U.S. Citizen in 1971. Professor Al-Marayati was hired at the University of Toledo as an Associate Professor in 1968. He subsequently obtained tenure in 1972 and a full professorship in 1971. From 1972 to 1975 he served as Chairman of the Department of Political Science. At trial Petitioner's Complaints centered around poor teacher evaluations, poor merit salary increases and the respondents' reprimanding of petitioner for exercising his first amendment right of free speech when petitioner had commented on the qualifications of Sharron E. Doerner, who was being considered for promotion in the Political Science Department. Petitioner had in part of that memorandum criticized Doerner's civil rights record. (Appendix J at ppA74-A75). Although petitioner's original complaint, filed on May 10, 1985, sought relief for discrimination in teaching evaluations and merit salary increases and for retaliatory acts since 1975, the District Court on February 21, 1986 dismissed all acts of alleged discrimination that occurred outside the 300 day filing period as time barred, but held that the events could be used as background on the timely charges if relevant. (Appendix A, p. A2).

Petitioner had also filed four grievances with the University of Toledo relative to his Complaints of discriminatory treatment. The fourth grievance pertained to respondent, Doerner's refusal as department chairman to provide petitioner in writing with documentation that supported the low evaluation and merit increase which petitioner received in 1983. The University of Toledo's Conference Committee requested the then President, Defendant Driscoll, to advise petitioner to cease his ongoing stream of complaining memoranda. On November 21, 1983, President Driscoll directed petitioner to refrain from any effort to renew the above grievances or be subject to disciplinary action. On November 14, 1983, plaintiff sent a memorandum to the department and executive committee complaining of the departmental masters program and specifically the treatment that two Arab students in the program had received. The executive committee chose on their own to expand the nature of the inquiry into plaintiff's memorandum to include issues raised by plaintiff in other memoranda which he had presented in the department resulting in a request to defendant Doerner that plaintiff be censured and a warning that if he continues his present pattern, the department would request disciplinary action. On January 27, 1984, the Department of Political Science adopted the executive committee's unprecendented resolution of censure against petitioner.

On December 21, 1984, respondent Driscoll officially reprimanded petitioner as a result of the letters objecting to the promotion of Professor Sharron E. Doerner in part because of Doerner's being discriminatory on the basis of race and politics. (Appendix A at p. A5)

This official reprimand occurred after the filing of a change of employment discrimination with the Ohio Civil Rights Commission on December 14, 1984. Petitioner also presented extensive testimony and documentation to the District Court relating to his claims that he was unfairly discriminated against in teaching evaluations, salary increases and merit increases for the academic year 1980-81 on as well as evidence relating to the highly subjective nature of the process.

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REASONS FOR GRANTING THE WRIT

Petitioner, Abid A. Al-Marayati, respectfully submits that the United States Court of Appeals for the Sixth Circuit has erroneously affirmed the District Court's denial of petitioner's first Motion for Leave to Amend his Complaint filed on May 11, 1987. This decision runs contrary to authority of this Court in two important respects as will be detailed below. In said motion, petitioner sought to re-cast his original complaint, which was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 (e)

et seq., as one seeking relief against Respondent, The University of Toledo, and Glen Driscoll, Karl Vezner, and Sharron E. Doerner both in their official capacities and individually. The proposed complaint which was lodged with the District Court sought compensatory damages, declaratory relief, and attorney's fees (Appendix J at pp. A66-A71). In its Memorandum and Order of August 5, 1987 and the District Court stated in pertinent part:

> The amended complaint alleges that the same acts described in the complaint are now violations of 42 U.S.C. Section 1983, thereby substituting 42 U.S.C. Section 1983 for 42 U.S.C. Section 2000 (e) as a theory of liability. Plaintiff makes one new factual allegation in the amended complaint, seeks to add the present president of the University as a new party, names all defendants in their individual capacities, seeks to add a jury demand and predicates his prayer for attorney's fees on 42 U.S.C. Section 1988... On February 21, 1986, this Court issued an order dismissing all of plaintiff's allegations which occurred outside the 300 day filing period under Title VII. The only new factual allegation in the amended complaint occurred no later than 1982. Therefore, under the precedent of *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986). This new allegation contained in paragraph 10 of the amended complaint is not cognizable in this proceeding.
>
> Furthermore, the Eleventh Amendment establishes an absolute bar to a suit for monetary damages against the state unless the state has

consented to be sued. *Alabama v. Pugh*, 438 U.S. 781 (1978). Under the precedent established by the Sixth Circuit and this Court, the University of Toledo and the individual defendants in their official capacities are entitled to immunity under the Eleventh Amendment as an alter ego or arm of the state. *Hall v. Medical College of Ohio*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Crenshaw v. University of Toledo* No C84-8067 (N.D. Ohio January 28, 1986). Therefore, the addition of the new allegations against the University and the individual defendants in their official capacities would not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b) (6).

The court determines that pursuant to the criteria of Fed. R. Civ. P. 15 (a) that, although any prejudice to defendants may be slight, the additional allegations of the proposed amended complaint are futile. (emphasis added). Appendix F. at pp A50 - A51.

The United States Court of Appeals for the Sixth Circuit noted that the alleged First Amendment deprivation sought to be added to the complaint by petitioner was based on a decision by President Driscoll and thus since Driscoll was sued solely in his official capacity, he was clothed with immunity under this Court's holding in *Will v. Michigan Dept. of State Police*, _____ U.S. ____, 109 S.Ct. 2304 (1989).

It is respectfully submitted that in his proposed amended complaint, petitioner realleged all facts contained in his original complaint. Moreover, he specifically sued the Respondents Doerner, Driscoll and Vezner both individually as well as in their

official capacities. He also sought compensatory damages which were not available under Title VII.

It is respectfully submitted that their is no absolute immunity covering the individual defendants in their individual as opposed to official capacities. See *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Scheuer v. Rhodes,* 416 U.S. 232 (1974). See generally *O'Connor v. Donaldson,* 422 U.S. 563 (1975); *Procunier v. Nabarette,* 434 U.S. 555 (1970); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Qualified immunities can be rebutted by a showing that the defendant lacked good faith. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Clark v. Beville,* 730 F.2d 739 (11th Cir. 1984). Qualified immunities can also be rebutted by a showing that the defendant's conduct exceeded the scope of his authority. *Merritt v. Mackey,* 827 F.2d 1368 (9th Cir. 1987). The proposed Amended complaint and Jury Demand contained allegations at paragraphs 10, 12 and 14 of violations of the First, Fifth and Fourteenth Amendments to the United States Constitution. It is submitted that both courts below overlooked the issue of petitioner's claims against the defendants as individuals and supervision of this Court is essential to secure a day in Court for petitioner on such sensitive issues.

The Sixth Circuit itself in *Berndt v. State of Tennessee and Lakeshore Mental Health Institute,* 796 F.2d 879 (6th Cir. 1986), stated at 796 F.2d. at 882:

> The Eleventh Amendment does not bar suits for money damages brought against state officials in

their individual capacities when they are alleged to have violated federal law. *Banas v. Dempsey*, 742 F.2d 277, 284, n. 10 (6th Cir. 1984), *aff'd*, *Green v. Mansour*, ____ U.S. ____, 106 S.Ct. 423, 88 L.Ed. 2d 933 (1985).

The Sixth Circuit's overlooking of petitioner's proposed Amended Complaint and Jury Demand insofar as it was in part against state officials in their individual capacities departs from precedent of this Court and the Sixth Circuit. The need for this Court's supervisory intervention is underscored.

In another important and intertwined respect, both courts below held that claims pursuant to 42 U.S.C. Section 1983 could not be presented if they were beyond the 300 day time bar previously applied by the District Court. The District court never reached the issue as to whether the proposed amendment, if granted, would relate back to the date of the filing of the original complaint. The Sixth Circuit's rationale, at Appendix A, pp A13-A14, is somewhat cryptic. The Sixth Circuit noted in passing that the Petitioner's Motion for Leave to Amend his Complaint was filed two years and one day after the original complaint was filed. The seeming uncertainty of the Sixth Circuit on the Statute of Limitations issue should be resolved in light of this Court's recent holding in *Owens v. Okure*, ____ U.S. ____, 109 S.Ct. 573 (1989). In that case, this Court held that where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the state's general or residual personal

injury statute of limitations. Subsequent to this Courts' decision in *Owens, supra,* the United States Court of Appeals for the Sixth Circuit held in *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989) (en banc) that the appropriate statute of limitations for section 1983 actions in Ohio is Ohio Revised Code Section 2305.10 which requires that actions for "bodily injury or injury to property" be filed within two years after their accrual. However, the Sixth Circuit did not discuss the applicability of Ohio Revised Code Section 2305.09, a four year limitations period for certain specified torts and "for an injury to the right of the plaintiff not arising on contract nor enumerated in Sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised code." The Sixth Circuit did not consider the applicability of the four year statute because neither party to the Court in Browning briefed or argued the issue.

As in New York, there are multiple statutes of limitations for personal injury in Ohio. The most general personal injury statute or residual statute encompassing personal injury claims is Ohio Revised Code Section 2305.09, the four year residual statute of limitations. This statute has been held to encompass types of personal injury claims that do not fall within the category of actions "for bodily injury or injury to property" under Ohio Revised Code Section 2305.10. Those claims would include, for example, personal injury claims for loss of consortium, loss of services and medical expenses, intentional infliction of mental distress, false imprisonment, invasion of privacy, conversion, and accountant's malpractice.

See e.g., *Amer v. Akron City Hospital*, (1976) 47 Ohio St.2d 85, 351 N.E. 2d 479; *Thomas v. Columbus*, 39 Ohio App. 3d 53, 528 N.E. 2d 1274 (Ct. App. Franklin Cty. 1974); *Bowling v. Brendamour's, Inc.*, 40 Ohio App. 3d 37 (Ct. App. Hamilton Cty. 1988).

In *Owens v. Okure, supra*, this Court cited several examples of appropriate general personal injury or residual statutes of limitation. Included in the examples are similar Alabama and North Carolina statutes. See *Owens v. Okure, supra*, 109 S.Ct. at 580, n 9. The language in both of the examples more closely resembles Ohio Revised Code Section 2305.09 (four year statute) than Ohio Revised Code Section 2305.10 (two year statute adopted by the Sixth Circuit in Browning). Application of the four year statute by the Courts below would have included most if not all claims alleged by petitioner in his proposed Amended Complaint and Jury Demand and, clearly, the newly alleged claim if the District Court permitted the amendment to relate back to the date of original filing.

Even if petitioner's proposed Amended Complaint and Jury Demand were construed to advance claims only against the respondent University and officials in their official capacities, assuming *arguendo*, the Courts below erred in not permitting the action to proceed under 42 U.S.C. Section 1983 for prospective injunctive relief. This Court has allowed suit against a state where prospective injunctive relief is sought. *Ex parte Young*, 209 U.S. 123 (1908). Most recently, in *Will v.*

Michigan Department of State Police, _____U.S. _____, 109 S.Ct. 2304 (1989), this Court noted at footnote 10 that official capacity actions for prospective injunctive relief under 42 U.S.C. 1983 are not treated as actions against the state. Therefore, the proposed Amended Complaint should have been permitted at least to the extent of allowing petitioner to seek prospective relief under 42 U.S.C. 1983. It is submitted that prospective relief could have been fashioned to restore petitioner to his claimed proper salary status. In *Kashari v. Purdue University*, 813 F.2d 843 (7th Circ. 1987), the Seventh Circuit noted at 813 F.2d at 848:

> Although the Eleventh Amendment bans all claims against Purdue and the damages claims against its officials in their official capacities, it does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement. Under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a suit for prospective injunctive relief is not deemed a suit against the state and thus is not barred by the Eleventh Amendment...
> ...We recently held that an injunction ordering reinstatement of a pharmacist "is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment." *Elliot v. Hinds*, 786 F.2d 298, 302 (7th Circuit 1986). The same result has been reached be the Sixth Circuit regarding reinstatement of a medical student, *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S.Ct. 796, 83 L.Ed. 2d 789 (1985)...

See also *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985).

It is respectfully submitted that, once again the Sixth Circuit did not consider this Court's precedent and its own precedent in its refusal to recognize petitioner's contention that he should have been permitted to obtain prospective relief under his sought for amendment.

Although the District Court, in its Memorandum and Order of August 5, 1987, held that the University of Toledo and the individual defendants in their official capacities were entitled to immunity under the Eleventh Amendment as an alter ego or arm of the state, it made no findings of fact supporting its conclusion. (Appendix F. at p. A48). In its Findings of Fact and Conclusions of Law filed June 21, 1988, the District Court found in its finding of fact number 9 that the Defendant "is a state funded educational institution whose operation and management is provided for in Ohio Rev. Code Section 3360.01 *et. seq.*" (Appendix B at p. A19). In its August 29, 1989 decision, the Sixth Circuit did not address whether or not sovereign immunity was applicable. In *Greenwood v. Ross*, 778 F. 2d 448 (8th Cir. 1985), a case involving the University of Arkansas, the Eighth Circuit noted that since it was unable to determine from the District Court order the basis for its decision that a Section 1983 action was barred by the Eleventh Amendment, it reversed and remanded the action. Appellate courts have considered multiple factors in reaching the Eleventh Amendment issue none of

which were addressed by the lower courts. See *Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986); *Kovats v. Rutgers*, 822 F. 2d 1303, 1307 (3rd Cir. 1987); *Ainsworth v. Aristocrat International Pty. Limited v. Tourism Company of the Commonwealth of Puerto Rico*, 818 F.2d 1034 (1st Cir. 1987). Moreover, the lower courts did not examine whether the State of Ohio had waived its immunity for suit. See *Florida Dept. of Health and Rehabilitation Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). It is submitted that the State of Ohio has consented to be sued for all discriminatory actions under Ohio Revised Code Chapter 4112 effective September 28, 1987. Ohio Revised Code Section 4112.01 (2) states that:

> "Employer" includes the state, or any political or civil subdivision therof, any person employing four or more persons within the state, and any person acting in the interest of an employer, directly or indirectly.

Moreover, Ohio Revised Code Section 4112.99 as amended effective September 28, 1987 provides:

> Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

It is respectfully submitted that the State of Ohio had waived, prior to trial on the within cause, its immunity to suit as to all discriminatory practices as set forth in Ohio Revised Code Chapter 4112. This

issue should have been remanded for examination by the Disctrict Court.

The Disctrict Court further found that Dr. Al-Marayati's reprimand of December 21, 1984 was justified as resulting from disruptive activity. However, the reprimand itself resulted from a memorandum dated November 19, 1984 to the Administrative Committee for Academic Personnel complaining that he could not support Professor Vezner's recommendation (for promotion) on behalf of Professor Doerner. In part, petitioner complained in that memorandum about Doerner's rendering meaningless the principles of academic freedom and tenure at the University of Toledo and that Doerner had exhibited discriminating behavior in social and political contexts. It is submitted that the memorandum was a protected expression of concern and that the respondent's reprimand was inherently retaliatory. (See Appendix J at p. A72).

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CONCLUSION

For the reasons set forth above, Petitioner prays that a Writ of Certiorari be granted.

Respectfully Submitted,
WASSERMAN, BRYAN, LANDRY & HONOLD

Francis J. Landry
Attorney for Petitioner
Abid A. Al-Marayati

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

NO. 88-3643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABID AL-MARAYATI	)	
	)	ON APPEAL FROM
Plaintiff-Appellant,	)	THE UNITED STATES
	)	COURT FOR THE
V.	)	NORTHERN DISTRICT
	)	OF OHIO
UNIVERSITY OF TOLEDO; GLEN DRISCOLL; KARL VEZNER; AND SHARRON E. DOERNER,	)	
Defendants-Appellee.	)	

(Filed August 29, 1989)

BEFORE: MARTIN, WELLFORD AND MILBURN, Circuit Judges.

PER CURIAM. Plaintiff-appellant Abid Al-Marayati appeals from a judgment in favor of defendants-appellees, the University of Toledo ("the University"); its president, Glen Driscoll; and two former chairmen of the University's Department of Political Science, Karl Vezner and Sharron Doerner, in this action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. For the reasons that follow, we affirm.

Al-Marayati, a native of Iraq, embraces the tenents of the Shiite sect of the Muslim religion. In this action commenced under Title VII on May 10, 1985, he contends that he has suffered discrimination since 1975 because of his national origin and religious beliefs in that the defendants intentionally gave him poor teaching evaluations and merit salary increases, inhibited and punished him for expressing his beliefs concerning matters affecting the University, and harassed him in the hope that he would resign his tenured position. He further contends that the defendants retaliated against him for filing a civil rights charge by reprimanding him for commenting on the qualifications of defendant Doerner when Doerner was being considered for a promotion.

On February 21, 1986, the district court dismissed all acts of alleged discrimination that occurred outside the 300-day filing period as time-barred, but held that the events could be used as background on the timely charges if otherwise relevant. On May 11, 1987, Al-Marayati sought to amend his complaint to dismiss the Title VII allegations and proceed instead under 42 U.S.C. § 1983. He also sought to allege a deprivation of his First Amendment rights in addition to unlawful discrimination and retaliation and requested a jury trial. The district court denied leave to amend, however, holding that allowing Al-Marayati to recast his complaint under section 1983 would be frivolous in that the court had previously dismissed all events occurring outside the 300-day filing period, the allegations regarding the First Amendment occurred outside the applicable

limitations period, and the Eleventh Amendment barred recovery of any monetary damages from the University and the defendants in their official capacity.

Al-Marayati filed a second motion to amend on November 6, 1987, seeking to add a claim for intentional employment discrimination under 42 U.S.C. §§ 1981 and 1985. He contended that such a claim was not cognizable until the Supreme Court's decision in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). On December 31, 1987, the district court denied leave to amend. In light of a trial date of February 16, 1988, the district court held that defendants would have insufficient time to conduct discovery and would be unfairly surprised and prejudiced by a complete change of theory on the eve of trial.

On January 26, 1988, Al-Marayati sought a continuance on the grounds that defendant Doerner's medical condition precluded the conclusion of his oral deposition and testimony at trial. However, the district court denied the motion without opinion on February 3, 1988.

A nonjury trial commenced on February 16, 1988. On March 9, 1988, at the conclusion of plaintiff's case, the defendants jointly moved for dismissal under Rule 41 of the Federal Rules of Civil Procedure. The district court denied the motion, concluding that Al-Marayati had presented sufficient evidence to establish prima facie claims of discrimination and retaliation. The trial then proceeded to a conclusion.

On June 21, 1988, the district court entered its findings of fact and conclusions of law. The district court held that plaintiff was not entitled to relief because he had failed to establish that the reasons given for the employment actions in question were pretextual. This timely appeal followed.

The record shows that Al-Marayati has repeatedly filed grievances within the University's structure for resolving disputes. It is undisputed that every grievance has been ultimately rejected following extensive review within the University. The record also establishes that Al-Marayati maintained a steady stream of memoranda within the Political Science Department wherein he complained of employment decisions and raised allegations of discrimination among fellow political science professors.

After the denial of Al-Marayati's fourth grievance on October 4, 1983, the University's Faculty Conference Committee sent a memorandum to the University's president, defendant Driscoll, wherein it stated its conclusion that Al-Marayati's persistent memos within the department were becoming counterproductive, that Al-Marayati had ignored the Committee's previous request that he cease the flow of memoranda within the department, and recommended that defendant Driscoll inform Al-Marayati in the strongest possible terms that his actions within the department were preventing him and other members of the faculty from performing their responsibilities as University professors.

Driscoll testified that he corresponded with Al-Marayati on November 21, 1983, and informed him

that he had exhausted all remedies within the University and that he should seek redress elsewhere, specifically mentioning the courts. He additionally informed Al-Marayati that he would request that the Board of Trustees approve disciplinary recommendations if Al-Marayati did not refrain from raising old grievances within the University.

During the following academic year, 1983-1984, defendant Doerner was recommended for promotion to the rank of full professor by then-department chairman, defendant Vezner, and the corresponding faculty committee. Although plaintiff did not attend any of the departmental meetings and chose not to submit an absentee ballot, he went outside of the University's processes and objected to Doerner's promotion with inter-University memoranda wherein he accused Doerner of being discriminatory on the basis of race and politics.

The Political Science Department ultimately decided to request disciplinary action against Al-Marayati and informed President Driscoll of its conclusion. Driscoll subsequently informed Al-Marayati on December 21, 1984, that he viewed the substance of the memoranda to be an effort to renew old grievances and noted that he had previously warned Al-Marayati on two prior occasions to refrain from "plowing the same ground." Noting that Al-Marayati had filed charges against the University with the Equal Employment Opportunity Commission, Driscoll encouraged Al-Marayati to pursue avenues of relief outside of the University. He instructed Al-Marayati to cease attempts to use the

University's internal grievance mechanisms to resolve his old grievances and informed Al-Marayati that if he persisted in renewing old grievances, he would recommend to the Board of Trustees that he be suspended without pay. Driscoll concluded his letter to Al-Marayati by stating that the letter should be viewed as an official reprimand.

There was significant testimony at trial regarding the conduct of Al-Marayati and others within the University's Political Science Department which indicates that Al-Marayati's relationship with his colleagues has steadily deteriorated since 1975. Department members testified that plaintiff refrained from speaking to colleagues who, while performing their duties as members of faculty committees or other positions, evaluated him less favorably than others. Al-Marayati stopped attending departmental meetings during the 1982-1983 academic year, and there was considerable testimony that he affected the department's morale. Finally, there was testimony that he was repeatedly advised over the years that he should "bury the hatchet," but that all attempts at reconciliation between him and other members of the department had been unsuccessful.

The issues presented in this appeal are whether the district court erred (1) in finding that Al-Marayati was not the subject of intentional discrimination on the basis of his religion or national origin; (2) in finding that Al-Marayati's censure and reprimand were not in retaliation for the exercise of his Title VII rights; (3) in denying Al-Marayati's motion for a continuance; (4) in denying Al-Marayati's two

motions to amend his complaint; and (5) in dismissing several of Al-Marayati's claims as untimely.

II.

In *Daniels v. Board of Education*, 805 F.2d 203, 208 (6th Cir. 1986), we held that when a district court decides "the ultimate factual issue, whether the plaintiff was a victim of intentional discrimination," then the focus of our inquiry on appeal is not on whether the district court properly applied the correct legal standard in reaching the ultimate question of discrimination, but whether the district court's finding is supported by substantial evidence. This court reviews a district court's findings of fact only for clear error under Rule 52(a) of the Federal Rules of Civil Procedure and will overturn a district court's findings of fact only when it "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

If a district court's findings "are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial court can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). As noted in *Henry v. Lennox Indus., Inc.*, 768 F.2d 746 (6th Cir. 1985),

> [t]he reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court ... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently.

Id. at 750 (quoting *Anderson*, 470 U.S. at 573-74).

A.

Al-Marayati contends that he suffered discrimination on the basis of his national origin and religion in the manner in which he was evaluated pursuant to the University's procedures. In response to the University's proffered reasons for the alleged discriminatory adverse employment decisions, Al-Marayati relies upon three instances which he alleges prove discriminatory animus. He relies on a note found in his mailbox wherein defendant Doerner was critical of the Iraq government and a letter Doerner penned to him while he was in Kuwait on leave of absence. In the letter, Doerner wrote of the hot and humid weather in Kuwait and noted his hope that Kuwait, like the American South, was an air-conditioned society. He further warned Al-Marayati to "keep his back against the wall." Doerner testified on deposition that the comments on the note were a furtherance of a lunch conversation between Doerner and Al-Marayati concerning Iraq. With regard to the letter, Doerner testified the first comment was in

reference to an earlier conversation in which the effect that Kuwait's hot and humid weather would have on Al-Marayati's bronchitis was discussed, and the latter comment was an expression of his concern for Al-Marayati's safety as an American in the Middle East. Finally, testimony was presented by one of Al-Marayati's colleagues of hearing racial comments in reference to plaintiff as a "camel driver". However, the testimony that he quickly tries to strike such comments from his mind and therefore could provide little information about them. He was unable to remember who made the comments or when they were made.

With regard to the above three incidents, the district court found that they were not indicative of any discriminatory animus on behalf of the defendants, and that the racial comments could not be linked to any of the defendants. After reviewing the record, we conclude that the district court's findings are not clearly erroneous.

B.

In his complaint, Al-Marayati contends that three separate actions taken by the defendants constitute retaliatory conduct as prohibited by Title VII. At trial, however, it appears that he only pursued one of these actions, his reprimand by the University, and additionally sought to establish that the merit increase he received after the University learned of his Title VII complaint was retaliatory.

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3, prohibits an employer from discriminating against an employee "because he has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing" under Title VII. However, employees are not protected or insulated from discipline or discharge merely due to the fact that they have filed charges of discrimination or opposed employer practices that they believe to be discriminatory. This court has made it clear that employers do not violate Title VII when they make an adverse employment decision regarding an employee within a protected category when the decision is made for reasons such as insubordination, poor work pe.formance, difficulty in getting along with fellow employees, or where the potential exists that the employee's continued presence would cause resentment or hostility. *See Daniels*, 805 F.2d at 208-09; *Weems v. Ball Metal and Chem. Div., Inc.*, 753 F.2d 527, 529-30 (6th Cir. 1985); *Morvay v. Maghielse Tool and Die Co.*, 708 F.2d 229, 233 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983).

In light of the substantial evidence in the record of Al-Marayati's conduct, we conclude that the district court did not err in concluding that the adverse employment decisions of which Al-Marayati complains were not in retaliation for the exercise of his Title VII rights. An employer is allowed to maintain internal discipline and a stable work environment, and [a]n employee is not protected by Title VII when he violates legitimate rules and orders of his employer, disrupts the employment

environment, or interferes with the attainment of his employer's goals. *Unt v. Aero Space Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985); see also *Rosser v. Laborers' Int'l Union*, 616 F.2d 221, 223 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980).

C.

Al-Marayati contends that the district court erred when it denied his request for a continuance of the trial date and to reopen discovery on the basis that defendant Doerner's medical condition precluded Al-Marayati from obtaining further discovery and Doerner's testifying at trial. Doerner's physician opined at the time that Doerner's heart condition was such that further testimony was potentially life-threatening.

The question of a continuance is addressed to the sound discretion of the district judge and will not be reversed on appeal unless there has been a clear abuse of discretion. *Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1128, 1141 (6th cir. 1969), *cert. denied*, 398 U.S. 928 (1970). In this instance, we do not find a clear abuse of discretion. There was no evidence at the time of the denial of the motion that Doerner's medical condition would ever improve to the point that he could withstand the rigors of trial or even a discovery deposition. Moreover, Al-Marayati is unable to show any substantial prejudice in that the discovery he had already obtained from Doerner was inadequate. Doerner's 150-page discovery deposition, his answers to written interrogatories, and his six-

page affidavit were admitted without protest by the defendants, and the plaintiff has not established why live testimony was needed. Accordingly, we do not find error.

D.

Al-Marayati contends that the district court erred in denying his two motions to amend. In his first motion filed on May 11, 1987, Al-Marayati sought to dismiss his allegations under Title VII and to proceed instead under 42 U.S.C. § 1983. In denying the motion, the district court held that allowing the plaintiff to recast his complaint as a section 1983 action would be frivolous because the court had on February 21, 1986, dismissed all of the allegations occurring outside of the 300-day period, the new allegations regarding deprivation of First Amendment rights occurred outside the applicable statute of limitations for section 1983 actions, and the Eleventh Amendment stood as an absolute bar to any section 1983 action for monetary damages. In this connection, we note that Al-Marayati's action had been pending since May 10, 1985.

In his second motion to amend filed on November 6, 1987, Al-Marayati sought to amend his complaint to allege violations of his rights under 42 U.S.C. §§ 1981 and 1985. The district court denied the motion because the case was in the final stages of trial preparation, and the defendants would be prejudiced by being denied the opportunity to adequately prepare

and file any motions regarding the added causes of action.

As noted by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1981), a district court is empowered to deny a motion for leave to amend a complaint if the denial is based valid grounds, and a trial court's discretion whether or not to grant leave to amend is subject to limited appellate review for abuse of discretion. In *Marx v. Centran Corp.*, 747 U.S. 1125 (1985), this court upheld the district court's refusal to allow amendment on "futility of amendment" grounds. We held that the district court had not abused its discretion in refusing to allow a plaintiff to amend his complaint to add claims which are unsupported by facts or were time-barred.

With respect to Al-Marayati's first motion to amend, we do not find abuse of discretion. As the Supreme Court has recently held in *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2310-11 (1989), state officials acting in their official capacities are not "persons" under section 1983. In this instance, the alleged First Amendment deprivation was the decision by President Driscoll to prohibit Al-Marayati from commenting on matters affecting the University. President Driscoll was sued solely in his official capacity and, under the holding in *Will*, was clothed with immunity under the Eleventh Amendment. Accordingly, the district court correctly concluded that allowing the amendment would be futile.

We are also of the view that the district court did not err in denying the second motion to amend. The case was on the eve of trial, discovery was in its later stages, and it would have been of obvious prejudice to require the defendants to defend on a theory not yet presented. Plaintiff contends that he was not aware of the potential cause of action under section 1981 until the Supreme Court's holding in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). However, that decision was handed down one month after Al-Marayati's first motion to amend, and we see no justification for allowing him to wait until the eve of trial to seek to amend his complaint.

E.

The final issue before us is Al-Marayati's contention that the district court erred in barring him from pursuing acts of discrimination occurring before the 300-day limitations period. Relying upon this court's holding in *Sawchik v. E. I. DuPont de Nemours & Co.*, 783 F.2d 635 (6th Cir. 1986), the district court determined that the continuing violation theory was inapplicable and, therefore, dismissed all alleged acts occurring outside the 300-day filing period. However, the district court allowed the acts as background material.

In *United Air Lines v. Evans*, 431 U.S. 553, 557 (1977), the Supreme Court held that the present effects of an earlier time-barred action are insufficient to constitute a present or continuing violation which

can be the subject of a timely EEOC charge. The Court concluded:

> A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558. In this instance, it is undisputed that Al-Marayati filed grievances and sought relief within the avenues of the University at the time of the alleged discriminatory actions. Clearly, he was of the view at that time that he had suffered discrimination and, therefore, should have engaged the machinery of Title VII if he did not obtain the desired redress within the University.

III.

Accordingly, for all of the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI, Plaintiff	)	Case No. C 85-7497
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
UNIVERSITY OF TOLEDO, et al.,	)	
Defendants	)	

(Filed June 21, 1988)

POTTER, J.:

This case was originally filed by plaintiff on May 10, 1985 pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (Title VII) against defendant University of Toledo (University) and individual defendants Glen Driscoll, Carl Vezner and Sharron Doerner in their individual and official capacities as University Administrators.

On February 5, 1988, this Court granted in part and denied in part defendants' motion for summary judgment, and this matter proceeded to trial on two distinct issues: (1) whether from 1984 to the present time plaintiff has been denied employment benefits, including adverse annual evaluations and resulting merit increases affecting his salary and benefits because of his national origin and religion; and (2) whether or not defendants have retaliated against plaintiff because of his assertion that defendants had

denied him rights protected by Title VII because of his national origin and religion in the fall of 1984. This matter proceeded to the taking of evidence on these issues in a trial to the Court on February 16 through 19 and March 3 through 10, 1988.

On March 9, 1988, at the conclusion of plaintiff's case, defendants moved for an involuntary dismissal of plaintiff's claims pursuant to Rule 41 of the Federal Rules of Civil Procedure, which the Court denied indicating that plaintiff had presented sufficient evidence to establish a prima facie claim of violation of Title VII on both issues. Thereafter, defendants presented their evidence and plaintiff submitted rebuttal testimony.

The parties were invited to and have submitted briefs on plaintiff's retaliation claim in addition to proposed findings of fact and conclusions of law. The Court finds that counsel's proposed findings of fact in the main were narratives of witnesses' testimony. The Court makes its own independent findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff was born in Iraq and came to the United States in 1949, becoming a permanent resident in 1967 and a U.S. citizen in 1971. Plaintiff believes in and embraces the tenets of the Muslim religion as a member of the Shiite sect thereof.

2. Plaintiff obtained his Bachelor of Science degree and thereafter his Master of Arts degree in political science from Bradley University in 1952 and

1954, respectively. In 1959 he received his doctoral degree in political science from New York University.

3. Thereafter plaintiff worked as a United Nations intern, assigned to the secretaries of the Delegations of Iraq and Yemen until 1969 when he taught one semester of political science as an instructor at the University of Massachusetts. From 1960 until 1962 he was a technical assistant officer with the United Nations International Atomic Energy Agency assigned in Vienna. From 1962 until January of 1964, he was employed as an associate professor at New York State College. In 1964 he was chosen to be a research fellow at Harvard University where he concentrated his research on the United Nations in the Middle East and Middle Eastern constitutions. He remained a research fellow until June of 1965 when he was employed as an assistant professor in the Political Science Department at Arizona State University.

4. In 1967 plaintiff was promoted to associate professor at Arizona State University, where he remained until he was hired at the University of Toledo in 1968.

5. Frank Lewis was the Chairman of the Political Science Department in 1968. In 1968, Lewis hired plaintiff to teach classes in International Relations and the Middle East. Plaintiff was hired as an associate professor at an initial salary of $12,500.00.

6. Plaintiff was granted tenure in 1970 and was promoted to the rank of full professor in 1972. Plaintiff was elected Department Chairman and

served a three year term beginning in Academic Year (AY) 1972-73.

7. Lewis also recruited and hired George Jan in 1968 at an initial salary of $16,500. Jan was a full professor at the University of South Dakota, where he had taught for seven years and was hired in that rank by the University. Jan was born and raised in China, now the People's Republic of China.

8. From 1968 until the present time, plaintiff has been the only faculty member with the Department of Political Science of Arab descent and who embraces the Muslim religion. However, there were 615 ranked faculty members at the University at the time of trial. Twenty-three ranked faculty members were born in the following countries: Iran, Lebanon, Israel and Egypt. Of this group, 18 are Arabs.

9. Defendant University is a state funded educational institution whose operation and management is provided for in Ohio Rev. Code § 3360.01 et seq.

10. Defendant Glen Driscoll was President of the University from October, 1972 until July 1, 1985.

11. Defendant Sharron E. Doerner is a full professor with tenure in the Political Science Department at the University. Doerner was elected Department Chairman for three consecutive three-year terms and served from AY 1975-76 through AY 1983-84. Based upon the recommendation of a physician selected by plaintiff, Doerner, who has a history of coronary problems, did not testify, nor was he present, at trial. The parties stipulated that he was

unavailable within the meaning of the Federal Rules of Civil Procedure.

12. Defendant Karl O. Vezner, a full professor with tenure in the Political Science Department at the University, succeeded Doerner as Chairman and is the current Chairman.

13. Plaintiff testified as to various alleged instances of discriminatory conduct on the part of Doerner in connection with his allegations of discriminatory treatment regarding his merit increases for the AY 1984-85 to present. One incident was a note taped to plaintiff's mailbox referring to the weather in Baghdad for the year 1978. The note was of unknown authorship except for a comment by Professor Doerner as follows: "Yes, but what about freedom of speech, press, assembly, petition and religion? And the freedom to be a non-Marxist?" Plaintiff did not know who placed the note on his mailbox. The earliest this note was called to the attention of the administration was 1981. Another incident was a letter from Professor Doerner to plaintiff dated September 21, 1981, when plaintiff was in Kuwait, which stated in pertinent part that plaintiff "ought to be an old Kuwaiti hand and have sampled both their sandstorms and high humidity. I hope for your sake that they are, like the American South, an air-conditioned society," and "Everyone wishes you well and keep your back to the wall." The Court finds as a fact that these incidents do not establish a discriminatory animus against this plaintiff.

14. Plaintiff also complained of racial slurs, but could not connect any of the statements to the defendants.

15. Plaintiff asserted that he received low merit and salary increases for the periods in question because of his national origin and religious preference. The University has a complicated, many-leveled process for determination of merit and salary increases with many safeguards.

16. At all relevant times hereto, the guidelines governing the salary process were set forth in the University's Manual of Policies and Procedures, Guidelines for Accountability (Guidelines). The opening paragraph of the Guidelines refers to the "long and continuing concern" that the faculty of the University has had regarding the University's system of accountability with respect to salaries, tenure, promotions and non-renewals. It is stated therein:

> The document on accountability has a primary purpose of assuring that each member has been advised on how the various levels of administration value his/her contribution to the University and, perhaps even more important, informing him/her on who makes the evaluations and what criteria are used in making them. The accountability guidelines are to be used by all levels and units where decisions are made with respect to salaries, tenure, promotion, and non-renewals.

17. The Guidelines also set forth the definition of academic freedom at the University. Academic freedom is defined in part as the right of free expression of ideas and opinions.

18. The Guidelines set forth five separate areas for evaluation: teaching, research and publication, service to the University other than classroom teaching and research, professional development and professional conduct, and public service relating to the University goals.

19. The Guidelines set forth the five independent units in the decision process which shall make recommendations prior to final decision by the President as follows: the department chairman; the college committee on salaries, promotions and tenure, or an equivalent committee; the college dean; the University Committee on Academic Personnel (ACAP); and the Offices of the Vice President for Academic Affairs and the President.

20. The Political Science Department had a department executive committee (D.E.C.), whose function is to advise the chairman, at all relevant times hereto. Departmental faculty elect the three members of the D.E.C. annually, and the composition of the D.E.C. generally changes completely from year to year.

21. As part of the merit evaluation process, a departmental faculty member prepares an annual report of professional activities (ARPA) covering the year under review. The ARPA is reviewed by the D.E.C. and the chairman the following academic year for merit increases to be awarded the next academic year.

22. Departmental members are notified after the chairman has arrived at the recommended merit increases. The information is next forwarded to the

ACAP. ACAP members are elected by their colleagues. According to ACAP's bylaws, its purpose is to "examine recommendations of the various departments to the Dean in order to insure the equitable treatment of all academic personnel and make college recommendations to the Dean to effect such treatment" and to advise the Dean of the College of Arts and Sciences on such matters.

23. The College Dean reviews the recommendations of ACAP and submits his recommendations to the University Committee or Academic Personnel (UCAP). UCAP also is a committee composed of elected faculty representatives. According to the Guidelines, UCAP's function is to see that there is equitable treatment to faculty in all colleges with respect to tenure, promotion and faculty ranks, salary and sabbatical leaves, and to advise the Vice President for Academic Affairs on such matters.

24. The Vice President for Academic Affairs advises the President. The final administrative judgment rests with the President. The information is then sent to the Academic Affairs Committee of the Board of Trustees for their review and final recommendation to the Board of Trustees, the final approving authority within the University.

25. Plaintiff's salary determinations were made in accordance with the Guidelines.

26. In regard to merit evaluation, teaching, research and service were considered. As to plaintiff's teaching ability, ratings from students, as to plaintiff's ability and attitudes were mixed.

27. Plaintiff received the University's Outstanding Teaching Award was not a factor in the recommendations regarding plaintiff's merit increases from AY 1984-85 to date because it was not received during any of the periods under review.

28. Plaintiff was Director of the Center for International Studies since 1972. The Center's effectiveness over the years was called into question by other departmental members affiliated with the Center and by the college dean.

29. Plaintiff received a low evaluation for research and publication and service.

30. Plaintiff, for the years 1984-85 and 1985-86, received merit increases of 0% and 1.4%.

31. Other faculty members at the University in addition to plaintiff have received zero merit increases. None were Arabic.

32. Other departmental faculty members in addition to plaintiff have raised salary grievances.

33. Other faculty members have been censured, reprimanded and/or fired.

34. The Court finds that the members of the Political Science Department of the University were not always congenial and were concerned about standing and relative compensation, but that their competitive conduct and rivalry were not motivated by discriminatory reasons involving national origin and religion.

35. Plaintiff was very active in voicing his opinion relative to policies and promotions of his colleagues. His numerous grievances, redundant memos and failure to use existing procedure irrated

defendants. The Court finds irritation, but no discrimination based on national origin or religion.

36. The Court further finds by a preponderance of the evidence that the reasons given for plaintiff's low evaluation by defendants during said ARPA periods are not pretextual.

37. The Court finds that the censure, reprimand and low merit evaluations were not in retaliation for plaintiff's exercising his Title VII rights. The Court also finds that plaintiff's censure and the letters of reprimand from President Driscoll, dated November 21, 1983, March 6, 1984 and December 21, 1984 were the result of plaintiff's refusal to follow the Guidelines and University procedure and not because plaintiff was utilizing Title VII procedures. President Driscoll advised plaintiff to seek external remedies and to resort to the civil courts.

Conclusions of Law

1. A Title VII case of sexual discrimination must be analyzed under the three prong test articulated by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). A plaintiff carries the burden of establishing a *prima facie* case. 450 U.S. at 252-53, 101 S. Ct. at 1093-94. If she establishes a *prima facie* case, the defendant must then articulate a nondiscriminatory reason for its actions. Id. If the employer does this, the burden is again on the

plaintiff to prove that the articulated reason was pretextual and not the true reason, either by showing that a discriminatory reason was the more likely motivation, or by showing that the articulated reason is unworthy of belief. (Citations omitted.)
Mills v. Ford Motor Co., 800 F.2d 635, (6th Cir. 1986).

2. "The plaintiff must ultimately prove that the defendant intentionally discriminated against her. 450 U.S. at 253, 101 S. Ct. at 1093." Id. at 638.

3. But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." (Citations omitted.)
Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978).

4. The controlling legal authority in Title VII "disparate treatment" cases is the Supreme Court's recent decision in *Texas Department of Community Affairs v. Burdine* (citation omitted). *Burdine* is, in essence, a refinement of the burden of proof analysis previously set out in *McDonnell Douglas Corp. v. Green*, (citation omitted).
Miller v. WFLI Radio, Inc., 687 F.2d 136, 138 (6th Cir. 1982).

5. "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination." (Footnotes omitted.) Id.

6. Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. (Footnotes omitted.) *Burdine*, 450 U.S. at 254.

7. "The burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987).

8. A plaintiff can establish that the legitimate, nondiscriminatory reason for the employment decision articulated by the defendant employer is pretextual in one of two ways. The first is to establish by a preponderance of the evidence that the discriminatory reason was the true reason motivating the employer's conduct. Alternatively, the plaintiff can prove pretext by showing that the proffered legitimate reason was false. (Citations omitted.) *Sims v. Cleland*, 813 F.2d 790, 792 (6th Cir. 1987).

9. The Court concludes that plaintiff has established a prima facie case of unlawful discrimination by demonstrating his membership in a protected category due to his religion and national origin, and by establishing that he was treated disparately in his employment under alleged circumstances which, if proven true, raise a rebuttable presumption of discrimination. In making this finding, however, the Court is mindful that the

burden of establishing a prima facie case is not enormous. *Burdine*, 450 U.S. at 253.

10. Defendant has articulated the following legitimate, nondiscriminatory reasons for plaintiff's merit increases: that plaintiff's teaching was the subject of student complaints; the plaintiff's professional conduct was disruptive and counter-productive; that plaintiff's service was not of a level to warrant a greater merit increases; and that plaintiff's scholarly research for the periods under review was minimal.

11. Plaintiff now has the burden to prove that the articulated reason is pretextual. *Mills*, 800 F.2d at 637.

12. The Court does not evaluate whether the employment decision was a correct decision or the best approach. The question is whether the decision was based upon impermissible considerations of religion and/or national origin. The focus is upon an employer's motivation, not its business judgment. *Burdine*, 450 U.S. at 258-259; *Liberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1981).

13. Personnel policies or practices which take into account subjective factors are not unlawful or even suspect absent a showing of adverse impact upon minority groups. *Burgus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 243 (10th Cir. 1980. *cert. denied* 459 U.S. 1071 (1983); *Wilkins v. University of Houston*, 654 F.2d 383. (10th Cir. 1981), *cert. denied*, 459 U.S.822 (1983).

14. This Court is not empowered to sit as a super review board of the University's employment decisions. The same difficulties inherent in

reviewing tenure decisions are present here. *Sec., e.g. Kemar v. Bd. of Trustees, Univ. of Mass.*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986).

15. The Court finds that the low merit increases were not based on retaliation or prompted by a discriminatory animus.

16. While the low ratings given to plaintiff during the years in question have been in error or based on professional rivalry or personal dislike, these factors do not constitute Title VII violations. Furthermore, plaintiff was subject, as previously found, to a multi-step evaluation process.

17. The Court concludes that plaintiff has failed to meet the burden to establish by a preponderance of the evidence either that any discriminatory reason was the true reason or that the proffered legitimate reasons were false. *See, Sims*, 813 F.2d at 792.

18. The evidence in the case does not establish that either religion or national origin was a factor in the treatment plaintiff perceived as disparate. Plaintiff has failed in his ultimate burden to prove by a preponderance of the evidence that defendants intentionally discriminated against him on the basis of his religion or national origin.

19. Plaintiff is not entitled to relief under 42 U.S.C. § 2000e-2(a)(1).

20. Title VII also makes it an unlawful employment practice for an employer subject to its provisions to discriminate against an employee "because he has made a charge, testified, assisted or participated in any manner in an investigation,

proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a).

21. Proof of a retaliation claim under title VII is governed by *McDonnell Douglas* and its progeny. Plaintiff must establish by a preponderance of the evidence: (1) that he engaged in a protected activity; (2) that the exercise of the civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Wrenn v. Gould*, 808 F.2d 493, 500-01 (6th Cir. 1987); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 377 (6th Cir. 1984), *cert. denied*, 106 S. Ct. 3208 (1986); *Burrus*, 683 F.2d at 343.

22. Employers are not protected or insulated from discipline or discharge merely due to the fact that they have filed charges of discrimination or opposed employer practices that they believe to be discriminatory. *See Brown v. Ralston Purina*, XX F.2d 570, 572 (6th Cir. 1977); *Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

23. Employers do not violate Title VII when they terminate or refuse to hire employees who are within protected categories for such reasons as insubordination, poor work performance, difficulty in getting along with fellow employees, or the potential that the employee's continued presence would cause resentment or hostility. *See Daniels v. Board of Ed. of Ravenna City Schools*, 805 F.2d 203, 208-209 (6th Cir. 1986); *Weems v. Ball Metal & Chem.*

Div., Inc., 753 F.2d 527 (6th Cir. 1983), *cert., denied*, 464 U.S. 1011 (1984).

24. The Court concludes that plaintiff has established a prima facie case of unlawful retaliation for filing a charge of discrimination by demonstrating that he was engaged in protected conduct, that defendant was aware of his protected activity and that defendant thereafter took an employment action adverse to plaintiff under circumstances which justify anf inference or retaliatory motive.

25. Defendants assert that plaintiff's reprimand was a result of progressive discipline for his continuing disruptive behavior in raising grievances, the merits of which had been previously adjudicated.

26. The Court concludes that the reason asserted for the reprimand is the true reason. The progressive warnings issued to plaintiff, which culminated in the reprimand, are well documented and precede the filing of plaintiff's charge of discrimination. Defendants' witnesses testified credibly as to the lawful motivation behind the reprimand. Plaintiff has failed to demonstrate that the reason for the reprimand is pretextual or that defendants acted intentionally to unlawfully retaliate against plaintiff for engaging in protected conduct.

27. Plaintiff is not entitled to relief under 42 U.S.C. § 2000e-3(a).

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that judgment be, and hereby is, entered in favor of defendants and against plaintiff, with costs to defendants.

United States District Judge

I hereby certify that this instrument is a true and correct copy of the original on file in my office, on file in my office.

Attest: James S. Gallas, Clerk
U.S. District Court
Northern District of Ohio

By: _____
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	Case No. C85-7497
	)	
Plaintiff	)	JUDGMENT IN A
	)	CIVIL CASE
V.	)	
	)	
UNIVERSITY OF TOLEDO, et al.,	)	
	)	
Defendants	)	

(Filed June 27, 1988)

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that judgment is hereby entered in favor of defendants and against plaintiff, with costs to defendants. Case dismissed.

_____

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	
	)	
Plaintiff,	)	Case No. C 85-7497
	)	
V.	)	MEMORANDUM
	)	AND ORDER
UNIVERSITY OF	)	
TOLEDO, et al.,	)	
	)	
Defendants,	)	

(Filed February 5, 1988)

POTTER, J.:

This matter is before the Court on defendants' motion for summary judgment, plaintiff's opposition, and defendants' reply. Also before the Court is plaintiff's request for clarification of this Court's February 21, 1986 order, and defendants' response. Plaintiff instituted this action for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964. Defendants are The University of Toledo (University), Glen Driscoll in his official capacity as President of The University, Karl Vezner individually and in his official capacity as Chairman of the Department of Political Science, and Sharon E. Doerner individually and in her official capacity as past chairman of the Department of Political Science. Plaintiff contends that the

defendants have intentionally discriminated against plaintiff on the basis of plaintiff's religion and national origin. Plaintiff also contends that defendants have retaliated Commission (EEOC). Plaintiff seeks recovery from defendants for compensatory damages, punitive damages, and the costs of this action, including an award of attorney's fees.

On February 21, 1986, this Court granted defendants' motion to dismiss the time-barred claims. The Court determined that any acts of discrimination occurring before February, 1984 are time barred and not compensable. Although the Court did determine that other acts of discrimination may be used to establish discrimination, the decision whether to admit these other acts will be based on their relevancy and probativeness, pursuant to Fed. R. Evid. 401 and 403, not on whether the evidence is derived from events that occurred within a certain time period. *Black law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 483 (6th Cir. 1987). However, even though this Court may allow plaintiff to admit evidence of acts occurring outside the 300 day time period, plaintiff must establish that because of plaintiff's national origin and religion, defendants discriminated against plaintiff by refusing to give him a 1984 merit increase.

Plaintiff alleges that this Court's order was vague. However, the order clearly explained that plaintiff's cause of action was limited to acts of discrimination occurring 300 days prior to the filing of the charge of discrimination. Therefore, the Court, without

objection from defendants, will consider whether defendants discriminated against plaintiff from February, 1984 until the present.

Without opposition from plaintiff, defendants contend that a Title VII action can only be maintained against a state government official in his official capacity. Richey, *Manual on Unemployment Discrimination Law & Civil Rights Actions in the Federal Courts*, A-7(A) (1984). However, plaintiff may maintain a cause of action against state entities pursuant to Title VII. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976). Furthermore, Title VII defines an employer as including any agent of any employer. 42 U.S.C. § 2000e(b) (1981). Supervisory employees may be agents of the employer. *Kelly v. Richland School District 2*, 463 F. Supp. 216, 218 (D.S.C. 1978). Therefore, plaintiff may maintain this action against the named defendants in their official and not individual capacity.

Title VII entitles a prevailing plaintiff to equitable relief. 42 U.S.C. § 2000e-5(g) (1981). Defendants contend that, since a prevailing plaintiff is only entitled to equitable relief including back pay, plaintiff is not entitled to compensatory or punitive damages. *Wilkins v. Walters*, 571 F. Supp. 474, 476 (N.D. Ohio 1983). This Court determines that, pursuant to Title VII, plaintiff is not entitled to compensatory or punitive damages.

Pursuant to this Court's February 21, 1987 order, plaintiff's only remaining charge of discrimination was the decision of defendants regarding the 1984 merit increase. Also, plaintiff alleges that three

actions taken by defendant constituted retaliatory conduct. The retaliatory conduct includes defendants' decision to change plaintiff's office, defendant Driscoll's official reprimand of plaintiff, and defendants' handling of plaintiff's request for a leave of absence.

Proof of a charge of discrimination and a claim of retaliation under Title VII is governed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1983) and its progeny. McDonnell requires that the plaintiff establish a prima facie case. Although this burden is easily met, the plaintiff must affirmatively establish the existence of each element of a prima facie case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the plaintiff has established a prima facie case, an inference of discrimination is created, and the burden of going forward shifts to the defendants "to articulate some legitimate non-discriminatory reason for the employees rejection." *McDonnell*, 411 U.S. at 802. If the defendant meets this burden of going forward, the burden of going forward shifts back to the plaintiff to demonstrate "that the legitimate reasons offered by the defendant were not true reasons, but were a pretext for discrimination." Id. at 804. The ultimate burden of proving that the defendant intentionally discriminated or retaliated against the plaintiff remains with the plaintiff at all times. *Burdine*, 450 U.S. at 253.

To establish a prima facie case of retaliation, the plaintiff must establish:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987).

Plaintiff does not dispute defendant's contention regarding defendant's decision to move plaintiff's office and defendant's handling of plaintiff's request for a leave of absence. As Vezner's affidavit states, Vezner was unaware that plaintiff filed a charge of discrimination when Venzer made the decision to change plaintiff's office. Also, defendants' handling of plaintiff's request for leave of absence was prior to plaintiff's filing the charge of discrimination. Therefore, since defendants were not aware that plaintiff had exercised his civil rights, plaintiff has failed to establish a genuine issue of fact regarding these two claims of retaliatory conduct. Therefore, defendants are entitled to judgment as a matter of law of these claims.

The Court has considered plaintiff's charge of retaliatory conduct regarding Driscoll's decision to officially reprimand plaintiff. When Driscoll sent the letter to plaintiff, plaintiff was engaged in a protected activity and plaintiff's exercise of these rights was known to defendants. Since Driscoll officially reprimanded plaintiff, defendant did take an employment action adverse to plaintiff. A genuine issue of material fact exists regarding the causal connection between the protected activity and the

employment action. The Court has considered defendants' contentions that Driscoll's letter was the logical consequence of plaintiff's own action. Whether or not Driscoll had legitimate reasons for sending the letter or the letter was sent in retaliation for plaintiff instituting legal proceedings against the University creates a genuine issue of material fact. Therefore, defendants are not entitled to judgment on this claim.

Plaintiff's remaining allegation of discrimination is based on not receiving a 1984 merit increase. Plaintiff contends that defendants' conduct in denying plaintiff a merit increase constituted unlawful discrimination against plaintiff on the basis of his religion and national origin. Two theories of employment discrimination exist under Title VII, disparate treatment and disparate impact cases. A disparate treatment case is one in which an employee alleges that he has been treated less favorably than his peers because of his race, sex, religion or national origin. *Burdine*, 450 U.S. at 256. In a case alleging disparate treatment, the plaintiff must prove differences in treatment and a discriminatory motive on the part of the employer. *Underwood v. Jefferson Memorial Hospital*, 639 F.2d 455, 457 (8th Cir. 1981). A disparate impact case is one in which the plaintiff alleges that facially neutral tests or employment criteria impact upon a protected group more harshly than other groups, and that this practice is not justified by legitimate, nondiscriminatory reasons. A party relying on both theories is not required to elect between the theories before, during or after the trial.

Rowe v. Cleveland Pneumatic Co., Numerical Control Inc., 690 F.2d 88, 92 (6th Cir. 1982).

A plaintiff alleging that his employer treated him less fairly than others because of his race, color, religion, sex or natioal origin has articulated a claim based on disparate treatment. *Chrisner v. Complete Auto Transit Co., Inc.*, 645 F.2d 1251, 1257 (6th Cir. 1981). Since plaintiff is contending that he received a low 1984 merit increase in comparison with other similarly situated faculty members, plaintiff has alleged a cause of action under the disparate treatment theory. However, under the disparate impact theory, plaintiff may establish theory. However, under the disparate impact theory, plaintiff may establish that the criteria used to determine the 1984 merit increase, although facially neutral, impacted upon individuals of plaintiff's religion or national origin more harshly than members of other groups. Construing the materials submitted under Fed. R. Civ. P. 56(e)[1] in the light most favorable to the plaintiff, this Court determines that, for the purpose of this motion only and defendants concede, plaintiff has established a prima facie case.

Defendants contend that even if plaintiff does establish a prima facie case, the decision not to give plaintiff a merit increase for 1984 was based on legitimate, nondiscriminatory reasons. The Court

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[1] This Court has considered all materials submitted in the proceeding, pursuant ot the mandates of Fed. R. Civ. P. 56. Therefore, in deciding the present motion, this Court has considered only those portions of the record which are properly before the Court.

has reviewed the depositions and affidavits of the parties. Plaintiff contends that the defendants subjected him to racial slurs and harassment. According to the plaintiff, the decision of defendants not to give plaintiff a merit increase was based on defendants' unlawful discrimination against plaintiff. Defendants reply to plaintiff's allegation of harassment and racial slurs by contending that these incidents were not intended as harassment or racial slurs.

The Court has considered *Kumar v. Board of Trustees, University of Mass.*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986). However, *Kumar* is procedurally distinguishable from the present proceeding. Notwithstanding this difference, this Court realizes that it cannot become a super reviewing board for university decision. Id. at 12, (Campbell, C. J., concurring). But the University is not permitted to make decisions based on an employee's religion or national origin.

The Supreme Court has recently held that a motion for summary judgment requires an inquiry to determine whether "there are any genuine issues that properly can be resolved only by a trier of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). In determining whether defendants' reasons for denying plaintiff a merit increase were legitimate or pretextual, this Court must evaluate the credibility of the respective parties and resolve factual disputes. Upon the record presently before this Court, the Court, as the trier of

fact, may resolve these factual disputes in favor of either party. Therefore, defendants' motion for summary judgment as to plaintiff's claim of discrimination is not well taken.

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that defendants' motion for summary be, and hereby is, GRANTED in part and DENIED in part.

_____

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	
	)	Case No. C 85-7497
Plaintiff,	)	
	)	
V.	)	MEMORANDUM
	)	AND ORDER
UNIVERSITY OF TOLEDO, et al.,	)	
	)	
Defendants,	)	

(Filed December 31, 1987)

POTTER, J.:

This matter is before the Court on plaintiff's motion for leave to amend the complaint, defendants' opposition, and plaintiff's reply. This action was filed in May, 1985. The complaint set forth two causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e. Defendants' filed a motion to dismiss contending that all of the allegedly discriminatory acts except one were time barred. On February 21, 1986, the Court granted defendants' motion to dismiss. This is plaintiff's second motion to amend. Plaintiff's first motion to amend sought to amend the complaint to include a cause of action under 42 U.S.C. § 1983 and to add a jury demand. The Court denied plaintiff's first motion to amend.

Plaintiff's second motion to amend seeks to add claims against the defendants under 42 U.S.C. § 1981 and 42 U.S.C. § 1985, alleging that "the denial of employment benefits and opportunities was the result of actions and a conspiracy to intentionally deny him benefits because of his natioal origin." Plaintiff's motion and memorandum for leave to file amended complaint at 2. Plaintiff claims that his cause of action for intentional employment discrimination was not recognized until the Supreme Court's decision of *Saint Francis College v. Al-Khazraji*, 407 S. Ct. 2022, *reh'g denied*, 107 S. Ct. 3244 (1987). Therefore, since this cause of action was not available to plaintiff when he filed his complaint, plaintiff maintains that the motion to amend should be granted.

Defendants contend that this motion is untimely because the Supreme Court's decision was issued within a few days of plaintiff's first motion to amend. Therefore, defendants contend that plaintiff could have incorporated this argument into the first motion to amend. Also, defendants maintain that the Sixth Circuit has recognized a cause of action for discrimination on the basis of national origin under 42 U.S.C. § 1981 and § 1985. *Marlowe v. Fisher Body*, 489 F.2d 1057, 1060 (6th Cir. 1973).

Although plaintiff alleged a cause of action for discrimination based on national origin in *Marlowe*, the court did not expressly recognize this type of discrimination as a valid cause of action under 42 U.S.C. § 1981 and § 1985. Id. at 1063. In this present proceeding, plaintiff should have been cognizant of

his rights shortly after the Supreme Court ruling in *Al-Khazraji*. However, even though a motion to amend was pending, plaintiff did not attempt to include a cause of action under 42 U.S.C. § 1981 until six months after the Supreme Court decision.

> Fed. R. Civ. P. 15 (a) provides:
> [a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calender, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). The granting or denying of a motion for leave to file an amended complaint is committed to the discretion of the Court. *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 401 U.S. 321, 330 (1971). If the non-moving party will be prejudiced by the amended complaint, the motion should be denied. Id. at 331. Also, if an amended complaint could not withstand a motion to dismiss under Fed. R. Civ. P. 12, plaintiff's motion to amend the complaint should be denied. *Neighborhood Development v. Advisory Council on Historic Preservation, Dept. of Housing & Urban Development*, 632 F.2d 21, 23 (6th Cir. 1980).

Therefore, if, as a result of permitting the plaintiff to amend the complaint, defendants will have insufficient time to conduct discovery, will be unfairly surprised by the change in theories or in

anyway be unable to effectively rebut plaintiff's new theory at trial, defendants will have demonstrated that the amendment adversely affected their posture in this litigation. *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). However, "[t]he fact that the defendants might have to undertake some discovery proceedings and have time within which to answer is not sufficient reason for denial of the motion." *Farrell v. Hollingsworth*, 43 F.R.D. 362, (D.S.C. 1968).

Furthermore, the request to amend the complaint to add civil rights claims should not be denied on the grounds of timeliness where no prejudice is alleged by the defendants. *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir.) *cert. denied*, 469 U.S. 871 (1984). But this issue of timeliness must be considered in conjunction with Fed. R. Civ. P. 1's express concern for the "just, speedy and inexpensive determination of every action." Fed. R. Civ. P.1.

This matter is in the final stages of trial preparation.[1] Furthermore, the Court has established December 1, 1987 as a motion practice deadline. If the plaintiff is permitted to amend, defendants are prejudiced by being denied an opportunity to adequately prepare and file any motions regarding these added causes of action. Therefore, plaintiff's motion is not well taken.

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that plaintiff's motion to amend be, and hereby is, DENIED.

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[1] February 16, 1988 is the fourth trial date assigned to this case.

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	
	)	Case No. C 85-7497
Plaintiff,	)	
	)	MEMORANDUM
V.	)	AND ORDER
	)	
UNIVERSITY OF TOLEDO, et al.,	)	
	)	
Defendants,	)	

(Field August 5, 1987)

POTTER, J.:

This matter is before the Court on plaintiff's motion for leave to amend the complaint and defendants' opposition. This action was filed in May, 1985. The complaint set forth two causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Defendants filed a motion to dismiss contending that all of the allegedly discriminatory acts except one were time-barred. On February 21, 1986, the Court granted defendants' motion to dismiss.

The amended complaint alleges that the same acts described in the complaint are now violations of 42 U.S.C. § 1983, thereby substituting 42 U.S.C. § 1983 for 42 U.S.C. § 2000e as the theory of liability. Plaintiff makes one new factual allegation in the amended

complaint, seeks to add the present president of the University as a new party, names all defendants in their individual and official capacities, seeks to add a jury demand and predicates his prayer for attorney's fees on 42 U.S.C. § 1988.

Plaintiff contends that the change of attorneys, after plaintiff's original counsel withdrew, is sufficient justification for allowing plaintiff to amend the complaint to Fed. R. Civ. P. 15(a). Defendants contend tnat the motion for leave to amend the complaint should be denied because it would be futile and unfair to allow the filing of the proposed amendment.

> Fed. R. Civ. P. 15(a) provides:
> [a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calender, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court of by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). The granting or denying of a motion for leave to file an amended complaint is committed to the discretion of the Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). If the non-moving party will be prejudiced by the amended complaint, the motion should be denied. Id. at 331. Also, if an amended complaint could not withstand a motion to dismiss under Fed. R. Civ. P. 12, plaintiff's motion to amend the

complaint should be denied. *Neighborhood Development v. Advisory Council on Historic Preservation, Dept. of Housing & Urban Development*, 632 F.2d 21, 23 (6th Cir. 1980).

Therefore, if, as a result of permitting the plaintiff to amend the complaint, defendant will have an insufficient time to conduct discovery, will be unfairly surprised by the change in theories or in anyway be unable to effectively rebut plaintiff's new theory at trial, defendant will have demonstrated that the amendment adversely affected their posture in this litigation. *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). However, "[t]he fact that the defendants might have to undertake some discovery proceedings and have time within which to answer is not sufficient reason for denial of the motion." *Farrell v. Hollingsworth*, 43 F.R.D. 362, 363 (D.S.C. 1968).

Defendants contend that by allowing plaintiff to recast his complaint as a § 1983 actio, defendants would be unfairly prejudiced, it would defeat the reasonable expectations of the defendants and would require additional expensive discovery. Furthermore, defendants contend that the amendment is frivolous and therefore plaintiff is not acting in good faith in filing this motion for leave to amend. On February 21, 1986, this Court issued an order dismissing all of plaintiff's allegations which occurred outside the 300 day filing period under Title VII. The only new factual allegation in the amended complaint occurred no later than 1982. Therefore, under the precedent of *Wilson v. Garcia*, 471 U.S. 261

(1985), and *Mulligan v. Hazzard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986), this new allegation contained in paragraph 10 of the amended complaint is not cognizable in this proceeding.

Furthermore, the eleventh amendment establishes an absolute bar to a suit for monetary damages against the state unless the state has consented to be sued. *Alabama v. Pugh*, 428 U.S. 781 (1978). Under the precedent established by the Sixth Circuit and this Court, the University of Toledo and the individual defendants in their official capacities are entitled to immunity under the eleventh amendment as an alter ego or arm of the state. *Hall v. Medical College of Ohio*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Crenshaw v. University of Toledo*, No. C 84-8067 (N.D. Ohio January 28, 1986). Therefore, the addition of the new allegation of paragraph 10 and the allegations against the University and the individual defendants in their official capacities would not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

The Court determines that pursuant to the criteria of Fed. R. Civ. P. 15(a) that, although any prejudice to defendants may be slight, the additional allegations of the proposed amended complaint are futile, thereby rendering plaintiff's motion for leave to amend the complaint unnecessary. Since the cases relied on by plaintiff involve the addition of counts to the complaint, not the deletion of existing theories of liability, these cases are unpersuasive.

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that plaintiff's

motion for leave to file an amended complaint be, and hereby is, DENIED and the amended complaint be, and hereby is, STRICKEN.

_____

United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	
	)	Case No. C 85-7497
Plaintiff,	)	
	)	MEMORANDUM
V.	)	AND ORDER
	)	
UNIVERSITY OF TOLEDO, et al.,	)	
	)	
Defendants,	)	

(Filed February 21, 1986)

POTTER, J.:

This cause came on to be heard on defendants' joint motion to dismiss and motion for stay. Defendants acknowledge that the motion to stay is moot and for this reason the motion to stay will be denied.

Defendants' motion to dismiss is directed to certain acts which fall outside the 300 day filing period. Plaintiff's complaint is in very general terms as to when the discrete acts of discrimination occurred. Defendants refer to the charge affidavit and assert that except for the merit increase act of 1984, all other discrete acts fall outside the 300 day filing period.

Plaintiff asserts that the other acts may be "background" to prove intent and that there is a

continuing violation. See *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

The Court first discusses the issue of continuing violation. The recent case of *Sawchik v. E. I. DuPont De Nemours & Co.*, No. 84-3783 (6th Cir. Feb. 13, 1986), is helpful. On page 6 the court said the following:

> Plaintiff's attempt to fix July 1, 1981 as the date that the 300-day time starts to run won't stand scrutiny. This was simply the date his retirement became effective. There is no suggestion, nor could there be, that any discriminatory act occurred on that date. It is now settled that the 300 day time period begins to run in a discrimination case when the individual involved became aware of the discriminatory act and not when the consequences are felt. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). *Ricks* also teaches that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Id. at 257.

"A plaintiff may not circumvent Title VII's stringent time limits merely by characterizing a completed act of discrimination as a 'continuing violation.' *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980)." Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts (1984) at p. A-18.

See also *Chardon v. Fernandez*, 454 U.S. 6 (1981). It is the order of the Court that all acts of discrimination which occurred outside the 300 day filing period are, therefore, time-barred. Pursuant to Evens, such acts may be relevant as background.

Since the Court has ruled that prior acts may be background, the Court instructs counsel, pursuant to Local Civil Rule 3.04, at attempt to resolve their differences concerning discovery.

THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that defendants' motion to stay be, and hereby is, DENIED; and it is

FURTHER ORDERED that defendants' motion to dismiss be, and hereby is, GRANTED; and it is

FURTHER ORDERED that plaintiff's motion to compel be, and hereby is, DENIED.

_____

United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABID AL-MARAYATI,	)	
	)	Case No. 88-3643
Plaintiff-Appellant,	)	
	)	ORDER
V.	)	
	)	
UNIVERSITY OF TOLEDO, et al.,	)	
	)	
	)	
Defendants-Appellees	)	

(Filed September 22, 1989)

BEFORE: MARTIN, WELLFORD, and MILBURN, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is THEREFORE ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX I

Ohio Revised Code 2305.09 Four years; certain torts

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground in injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

HISTORY: 129 v 13, eff. 7-1-62
1953 H 1; GC 11224

Ohio Revised Code 2305.10 Bodily injury or injury to personal property; when certain causes of actio arise

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to

chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethlystibestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

HISTORY: 1984 H 72, eff. 5-31-84
1982 S 406; 1980 H 716; 1953 H 1; GC 11224-1

Ohio Revised Code 4112.01 Definitions

(A) As used in sections 4112.01 to 4112.11 of the Revised Code: ...

(2) "Employer" includes the state, or any political or civil subdivision thereof, any person employing four or more persons within the state, and any person acting in the interest of any employer, directly or indirectly.

Ohio Revised Code 4112.99 Civil Action for violations

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

HISTORY: 1987 H 5, EFF. 9-28-87
1976 S 162; 1969 H 432; 128 V 12

---

42 USC § 1983

Ohio Revised Code Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1989; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

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42 USC § 2000(e)-3(a)

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joing labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or application for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	)	
	)	Case No. C 85-7497
Plaintiff	)	
	)	
V.	)	COMPLAINT
	)	
UNIVERSITY OF TOLEDO,	)	
	)	
and	)	
	)	
GLEN DRISCOLL,	)	
	)	
and	)	
	)	
KARL VEZNER,	)	
	)	
and	)	
	)	
SHARON E. DOERNER,	)	
	)	
Defendants,	)	

1. Jurisdiction for this action is based upon Section 706 of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-5. In the alternative jurisdiction is based upon 28 USC 1331 and 2201.

2. The Plaintiff is a citizen of the State of Ohio, and a resident of Toledo, Lucas County, Ohio. His

country of national origin is Iraq and he is a Muslim in his religious beliefs.

3. The Defendant, University of Toledo (hereafter University) is a part of the Ohio State University System and has been the Plaintiff's employer since 1968.

4. The Defendant, Glen Driscoll is the President of the University and is charged by law and by the Board of the Trustees of the University with the operation and management of the University.

5. The Defendant, Karl Vezner is an employee of the University and is currently the Chairman of the Political Science Department. The Defendant Sharon Doerner is a member of the Political Science Department and was its former Chairman.

FIRST CAUSE OF ACTION

6. In 1972 Plaintiff was promoted by the University to the rank of full professor in the Department of Political Science.

7. Since 1975 the Plaintiff has been subjected to an ongoing campaign of harassment affecting the terms and conditions of his employment because of Plaintiff's national origin and/or religious beliefs.

8. The Defendants have intentionally discriminated against the Plaintiff because of his national origin and/or religious beliefs by:

a. giving Plaintiff poor teaching evaluations while knowing that such evaluations were false;

b. giving Plaintiff poor merit salary increases;

c. inhibiting and punishing Plaintiff for expressing his beliefs concerning matters effecting the University and the Political Science Department;

d. conducting a campaign of harassment with a view towards forcing Plaintiff to resign his tenured faculty position.

9. Specific examples of the Defendants' discrimination include, but are not limited to the following incidents:

a. The year the Plaintiff won the University's "Outstanding Teacher Award" is the same year Plaintiff was given a poor salary merit increase, substantially less than the average in the department, because the Defendant was evaluated by his department as a "poor teacher";

b. Another member of the Political Science Department was hired the same year as Plaintiff. Although Plaintiff has the same seniority at the University of Toledo as this individual. The other non-Muslim non-Iraqi faculty member, now has a salary significantly higher than Plaintiff which is solely the result of the unlawful discrimination which Plaintiff is suffering.

10. The actions of the Defendants as set out above are in violation of Civil Rights Act of 1964, as amended.

11. On or about April 19, 1985, after having filed the charge of discrimination with the Ohio Civil Rights Commission, as required by law, Plaintiff received a "right to sue" letter from the Equal Employment Opportunity Commission, a copy of which is attached as Exhibit A.

SECOND CAUSE OF ACTION

12. After filing the charge of discrimination with the Ohio Civil Rights Commission as required by law, the Defendants retaliated against the Plaintiff. The retaliatory conduct of the Defendants included:

a. Moving Plaintiff from the office that be occupied for over fifteen years to a smaller and less desirable office, and moving into Plaintiff's old office a non-Iraqi, Non-Muslin, faculty member with less seniority than Plaintiff;

b. Reprimanding Plaintiff for exercising his first amendment right of free speech when Plaintiff commented on the qualifications of Sharon E. Doerner, who was being considered for promotion in the Political Science Department;

c. By refusing to inform Plaintiff whether he could take a leave of absence for 1984-1985 after Plaintiff filed an application pursuant to the University's official rules and regulations.

13. The actions of the Defendant as set out above are in violation of Section 704 (a) of the Civil Rights Act of 1964, as amended.

WHEREOF, Plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to:

a. Declare that the Plaintiff has suffered from the acts of discrimination at the hands of the Defendants;

b. Award Plaintiff the back pay he should have earned together with the related benefits and interest had he not been discriminated against by the Defendants;

c. Award Plaintiff compensatory and punitive damages;

d. Award Plaintiff the costs of this action, including an award of reasonable attorney fees and such an other and further relief as may be just and proper.

Michael N. Vaporis
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ABID AL-MARAYATI,	
	Case No. C 85-7497
Plaintiff,	
	AMENDED
V.	COMPLAINT AND
	JURY DEMAND
UNIVERSITY OF TOLEDO and GLEN DRISCOLL, KARL VEZNER, SHARRON E. DOERNER and JAMES D. McCOMAS, Individually and in their Official Capacities, Jointly and Severeally,	
Defendants,	

AMENDED COMPLAINT

NOW COMES PLAINTIFF, by and through his attorneys, Lawrence D. Hochman and Jeffrey Lydy, and for his Amended Complaint states as follows:

COUNT I - VIOLATION OF 42 USC 1983

1. Jurisdiction is based upon 28 USC 1331 and 1343.

2. The Plaintiff is a citizen of the State of Ohio, and a resident of Toledo, Lucas County, Ohio. His

country of national origin is Iraq and he is a Muslim in his religious beliefs.

3. The Defendant, University of Toledo (hereafter University) is a part of the Ohio State University System and has been the Plaintiff's employer since 1968.

4. The Defendant, Glen Driscoll was the President of the University and was charged by law and by the Board of the Trustees of the University with the operation and management of the University.

5. The Defendant, Karl Vezner is an employee of the University and is currently the Chairman of the Political Science Department. The Defendant Sharron Doerner is a member of the Political Science Department and was its former Chairman. The Defendant James E. McComas is the current President of the University.

6. In 1972 Plaintiff was promoted by the University to the rank of full professor in the Department of Political Science.

7. Since 1975 the Plaintiff has been subjected to an ongoing campaign of harrassment affecting the terms and conditions of his employment because of Plaintiff's national origin and/or religious beliefs.

8. The Defendants have intentionally discriminated against the Plaintiff because of his national origin and/or religious beliefs by:

a. giving Plaintiff poor teaching evaluations while knowing that such evaluatios were false;

b. giving Plaintiff poor merit salary increases;

c. inhibiting and punishing Plaintiff for expressing his beliefs concerning matters effecting the University and the Political Science Department;

d. conducting a campaign of harrassment with a view towards forcing Plaintiff to resign his tenured faculty position.

9. Specific examples of the Defendants' discrimination include, but are not limited to the following incidents:

a. The year the Plaintiff won the University's "Outstanding Teacher Award" is the same year Plaintiff was given a poor salary merit increase, substantially less than the average in the department, because the Defendant was evaluated by his department as a "poor teacher";

b. Another member of the Political Science Department was hired the same year as Plaintiff. Although Plaintiff has the same seniority at the University of Toledo as this individual. The other non-Muslim non-Iraqi faculty member, now has a salary significantly higher than Plaintiff which is

solely the result of the unlawful discrimination which Plaintiff is suffering.

10. When Plaintiff, at the request of a student, posted a summary of Baghdad, Iraq weather for a particular year, Defendant Doerner wrote on that summary the following,

> "Yes, but what about freedom of speech, press, assembly, petition, and religion? And the freedom to be a non-Marxist?"

and attached same to the mailboxes for all to see, in an attempt to harass, embarrass and intimidate Plaintiff and in implicit violation of Plaintiff's protected liberty rights under the First and Fourteenth Amendments.

11. On or about April 19, 1985 Plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission and Defendants retaliated against Plaintiff in the following ways, among others:

a. Moving Plaintiff from the office that he occupied for over fifteen years to a smaller and less desirable office, and moving into Plaintiff's old office a non-Iraqi, Non-Muslim, faculty member with less seniority than Plaintiff;

b. Reprimanding Plaintiff for exercising his first amendment right of free speech when Plaintiff commented on the qualifications of Sharon E. Doerner, who was being considered for promotion in the Political Science Department;

c. By refusing to inform Plaintiff whether he could take a leave of absence for 1984-1985 after Plaintiff filed an application pursuant to the University's official rules and regulations.

12. By virtues of its acts and omissions Defendants, acting under color of State law, deprived Plaintiff of his protected liberty, property and due process and equal protection interests under the First, Fifth and Fourteenth Amendments to the United States Constitution in violation of 42 USC 1983.

13. The acts and omissions of Defendants were a proximate cause of Plaintiff's injuries and damages.

14. Plaintiff suffered loss of income, humiliation, outrage, indignity, mental distress and the loss of valued civil rights due to the invidious discrimination by Defendants.

WHEREFORE PLAINTIFF RESPECTFULLY PRAYS for the following:

a. Actual, compensatory and punitive damages in excess of $10,000.00, together with costs.

b. Reasonable attorney fees as per 42 USC 1988.

c. A declaratory judgment that the acts complained of are unconstitutional.

JURY DEMAND

Plaintiff demands a trial by jury.

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Dated: June 21, 1987

PROOF OF SERVICE

The undersigned certifies that he served this pleading upon all attorneys of record by placing same in an evelope, properly addressed and stamped, and depositing same in a U.S. Mailbox in Ann Arbor, MI on June 21, 1987.

November 19, 1984 (Trial Exhibit TT)

MEMORANDUM TO:
Administrative Committe for Academic Personnel

FROM:
Abid A. Al-Marayati, Professor
Department of Political Science

RE: Nomination for Promotion of Mr. Sharron E. Doerner

I have received a memorandum from Karl O. Vezner, Chairman, Department of Political Science, in which he endorses the recommendation of the Executive Committee of the Department, that Mr. Doerner be promoted to the rank of professor. Professor Vezner's memorandum refers also to the availability of promotion materials in the main office of the Department on Monday, November 5. I have examined the material relating to Professor Doerner as follows:

1. his curriculum vitae

2. letters from Professors, Bigney, Larson, Weisfelder and Wilson

3. pamplet, "Indian Votes: Election Returns for United States Representatives and State Assembly 1922-1958," of which Professor Doerner is co-editor.

This is all of the material that was presented in the office relating to the nomination, and I assume there was nothing further to be added to it. There was no explanation of the rationale of the Executive Committee and the Chairman in making their recommendation. I wish to state on the basis of the materials presented, I find no grounds whatever for supporting the nomination of Professor Doerner for professional rank. According to Professor Vezner's memorandum a departmental meeting to discuss the recommendation was held on Friday, November 9; I was unable to attend this meeting, being absent at a conference.

I cannot support Professor Vezner's recommendation on behalf of Professor Doerner, for reasons as follows:

Teaching: In respect of Professor Doerner's teaching record, I have been shown no written reports from students. Rather, anonymous oral attributions are cited purporting to favor Professor Doerner. In the circumstances, where were are involved in considering "the highest recognition the University can bestow upon individual." I find such citations insubstantial and unacceptable.

I submit that alleged hearsay on the part of academic personnel whose function in no way relates to teaching evaluations, is not only unacceptable but rather dangerous, as being open to abuse, postively or negatively.

Professor Doerner received the Outstanding Teaching Award in 1970: it may be assumed that

reward for this distinction has already been bestowed. In any case, the Department has not recognized this Award in merit evaluation. Moreover, there is provision in the Department for written evaluations by students: no such evaluation has been produced for Professor Doerner.

Service: The service attributed to Professor Doerner has been mainly in the political area within the University. This is not to say that such service may not be useful, and that the nominee has not already been rewarded for it from year to year in merit pay. It does not compare however, with the broader areas of service extending to the community at large.

One letter of support for Professor Doerner's nomination reports his steady attendance at meetings of the Conference Committe. However, as a department chairman, Professor Doerner was but rarely in his office, and conducted department business from his residence. In this context , I see nothing about the service record of the nominee that in any way would recommend him for promotion, bearing especially in mind the guidelines for promotion of the College of Arts and Sciences.

It has been suggested on behalf of Professor Doerner that he is a defender of faculty rights. This opinion is altogether at variance with my own knowledge of Professor Doerner's behavior, where he grossly violated all canons of civil discourse and accountability, rendering meaningless the principles of academic freedom and tenure at The University of

Toledo. The damage in this context to Department, College, and University is yet to be assessed.

In addition, he as exhibited discriminating behavior in racial and political contexts.

Research: Professor Doerner's contribution under this heading is so negligible as to be of no significance. He is listed as co-editor of what is essentially a compilation of statistics in a pamphlet that was published some twenty-two years ago: no doubt, if any credit was due for this, it has already been given. The exhibition of this as grounds for promotion merely highlights the absence of any other contribution under this heading. Professor Doerner has, of course, never proceeded to the Ph.D. degree.

Considering the foregoing, and bearing in mind the wording of the Guidelines for faculty promotion, which says, in part: "The professor should be a mature faculty member of established teaching ability, scholarly achievements, and service. Normally, he should be a recognized, creative, and highly regarded scholar in his field ...," it is clear that the academic profile of Mr. Doerner in no way correlates with the profile of the faculty member who is to be considered for the "highest recognition the University can bestow upon an individual."

These representations in writing as an integral part of the documentation relating to the proposal to promote Professor Doerner. I do this with the reasonable expectations that, as my representations herein are available to anyone concerned with this matter, any representations made by others, apart

from those I have listed above, will be made available to me for my information and possible response.

I draw the attention of everyone concerned that I may be going on a leave of absence about the end of this Fall Quarter. Accordingly, if further information or elaboration is desired, I should be glad to provide it.

cc: William N. Free, Vice President for Academic Affairs
Alfred A. Cave, Dean, College of Arts and Sciences
University Committee on Academic Personnel
S.E. Doerner, Associate Professor, Department of Political Science
Karl O. Vezner, Chairman, Department of Political Science
Committee on Promotion, Department of Political Science

Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-975

IN THE

Supreme Court of the United States

October Term, 1989

ABID A. AL-MARAYATI,
Petitioner,

vs.

THE UNIVERSITY OF TOLEDO, GLEN DRISCOLL, KARL VEZNER and SHARRON E. DOERNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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23pp

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court below's affirmance of the district court's denial of Petitioner's motion for leave to amend his complaint provides a sufficient basis for review by this Court.

2. Whether the court below's affirmance of the district court's decision that the Petitioner's reprimand was not in retaliation for the exercise of his Title VII rights provides a sufficient basis for review by this Court.

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No. 89-975

IN THE

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October Term, 1989

ABID A. AL-MARAYATI,
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THE UNIVERSITY OF TOLEDO, GLEN DRISCOLL, KARL VEZNER and SHARRON E. DOERNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Respondents do not contest the statement of opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the statement of jurisdictional grounds set forth in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondents agree that the following statutory provisions, as set forth at Petitioner's Appendix A57, 59-60, are applicable to this Petition for Writ of Certiorari: 42 U.S.C. §2000e-3(A); 42 U.S.C. §1983; and Ohio Rev. Code Ann. §2305.10. Respondents dispute, however, the applicability of the remaining statutory provisions cited therein.

RESTATEMENT OF THE CASE

Professor Al-Marayati has been unhappy at the University almost from the date of his arrival in 1968 as an associate professor. He filed his first grievance with the Faculty Conference Committee ("FCC"), the elected peer-review advisory body to the President on all personnel and policy matters affecting faculty, in 1972. This grievance was the first of a steady stream of complaints filed with various bodies, including the Advisory Committee on Academic Personnel ("ACAP") and the FCC stemming from what he believed was his low entry-level salary. Grievances followed in 1980, 1982 and another in 1983. In the interim, Al-Marayati raised the issue of his merit increases in various letters and memoranda to then-President Driscoll. Not one body at the University ever found merit to any of the grievances.

Driscoll corresponded with Petitioner on a number of occasions and, in August 1982, reminded Al-Marayati to raise complaints in accordance with University policy before turning to him. In November 1983, Driscoll received a memorandum from the FCC regarding Petitioner's fourth grievance and containing the FCC's recommendation. Driscoll then warned Petitioner of the deleterious effects of his "ongoing stream of complaining memos" and informed Al-Marayati that he had exhausted all remedies at the University, that he should seek future redress in the courts, and that, if Petitioner did not refrain from raising old grievances, Driscoll would request the Board of Trustees to approve disciplinary action against Al-Marayati.

It was the Political Science Department, however, that bore the daily brunt of Al-Marayati's dissatisfaction. In early 1984, the department executive committee investigated nine of Al-Marayati's multi-page

memoranda regarding various departmental matters, concluding they were meritless. In January 1984, the department resolved that it would pursue disciplinary action at the college and university levels if Petitioner did not discontinue the constant flow of memoranda. About this time, Doerner was unanimously recommended to the rank of full professor by the chairman and department committee. Al-Marayati did not attend the department meeting, nor did he submit an absentee ballot; instead he objected to the promotion by memorandum to ACAP, contrary to the established promotion process. The department's request that Al-Marayati be officially reprimanded for having renewed old criticisms of Doerner, after being presented at the appropriate levels within the University, resulted in Driscoll's decision to officially reprimand Al-Marayati. In correspondence dated December 21, 1984, Driscoll informed Petitioner that he viewed the substance of Al-Marayati's memoranda to ACAP objecting to Doerner's promotion as an effort to renew old grievances and reminded Petitioner that he had been warned on two prior occasions to refrain from plowing the same ground. Driscoll also encouraged Petitioner to seek outside avenues of review (such as with the Ohio Civil Rights Commission, with which Petitioner had filed a charge of discrimination on December 14, 1984), instructed Petitioner to cease attempts to use the University's internal grievance mechanisms to resolve old grievances, and characterized the letter as an "official reprimand."

Petitioner filed his original complaint in the case on May 17, 1985. Respondents filed a motion to dismiss, which the district court granted, ordering that all acts of discrimination which occurred outside the 300-day Title VII filing period were time-barred, but, where relevant, could be used as background for the timely

discrimination charges. (Petitioner's App. G.) Petitioner's first counsel withdrew, and his second counsel filed a motion for leave to amend the complaint to substitute 42 U.S.C. §1983 for the Title VII claim on May 11, 1987. This motion was denied on August 5, 1987. Petitioner's second attorney then withdrew, and his third attorney filed a second motion for leave to amend to add claims under 42 U.S.C. §§1981 and 1985 on November 6, 1987. This motion was also denied.

A non-jury trial was conducted over a ten-day period. Seventeen witnesses presented live testimony at trial. The bulk of the trial testimony was devoted to Petitioner's merit evaluations from academic year 1984-85 to the time of trial. In accordance with the trial court's February 21, 1986 memorandum and order (Petitioner's App. G), evidence of acts which occurred outside of the Title VII 300-day filing period, and thus were time-barred, was permitted as background on the timely discrimination charges. As a result, testimony at trial dated back as far as twenty years. Despite the latitude given to Petitioner, the trial court held that he failed to prove intentional discrimination on the basis of his religion and/or national origin and that his reprimand was not in retaliation for the exercise of his Title VII rights. The United States Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court for the Northern District of Ohio in all respects. For the reasons which follow, the Petition for Writ of Certiorari must be denied.

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED

Most of the issues which Petitioner attempts to frame in his Petition were given little or no attention in briefings below. They raise no new and important federal questions; they are in no way related to matters about which there is conflict among the circuits; and they do not reflect a conflict between the lower courts' decisions and the decisions of this Court. Petitioner asserts only that the decisions below depart from precedents of this Court and the Sixth Circuit. He does not assert that the decisions below misstate the law, but only that they misapply the law to the facts of this case.

Nor does Petitioner offer any explanation of why the issues presented here are important enough to warrant review by this Court. They are not. The issues will not affect the outcome in this case; are bound to the particular facts of this case; pertain to a settled procedural matter within the discretion of the trial court; and involve a factual determination of two lower courts. They do not provide any basis for this Court to exercise its powers of supervision.

I. THE DENIAL BY THE DISTRICT COURT AND THE AFFIRMANCE BY THE SIXTH CIRCUIT OF PETITIONER'S FIRST MOTION FOR LEAVE TO AMEND COMPLAINT PROVIDE NO BASIS FOR REVIEW BY THIS COURT.

The primary focus of Petitioner's arguments in support of his Petition is his assertion that the district court erred in denying his first motion for leave to amend his complaint whereby he sought to frame his cause of action in terms of 42 U.S.C. §1983 instead of under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Four of the five Questions Presented by the Petitioner are related to the district court's memorandum and order of August 5, 1987. (Petitioner's brief at App. F.)

Petitioner's attempt to frame the district court's August 5, 1987 decision and the Sixth Circuit's affirmance as a suitable vehicle for review by this Court must be characterized as nothing short of frivolous. Professor Al-Marayati's private view that he has been unfairly treated has been rejected by the two lower courts. His continued pursuit of grievances against his employer and his colleagues by petitioning this Court is an act of egotism which can only serve to harass the Respondents.[1] While the matters raised in his Petition

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[1] Petitioner's campaign of harassment continues in other courts. He is presently pursuing litigation in the Ohio Court of Claims against another department chairman, alleging that he was libeled, in *Abid A. Al-Marayati v. The University of Toledo,* Case No. 89-12569 (Ohio Ct. Claims), and in the United States District Court for the Northern District of Ohio against the University where, in his third amended complaint, Petitioner alleged discrimination under Title VII on the basis of his national origin and religion, and retaliation. *Abid A. Al-Marayati v. The University of Toledo, et al.,* Case No. 3:89CV7132 (N.D. Ohio).

are undoubtedly important to Professor Al-Marayati personally, he has raised and preserved no issues that are of public interest.

It is well-settled that the granting or denying of leave to amend a pleading is a procedural matter within the discretion of the trial court. *See* Fed. R. Civ. P. 15(a). Both the district court and the Sixth Circuit recognized that a trial court may deny a motion for leave to amend if such denial is based upon valid grounds. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77, *reh. denied*, 401 U.S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552 (1971). The trial court's determination to deny leave to amend is subject to limited appellate review for abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*; *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985). The Sixth Circuit found that the trial court had not abused its discretion in denying Petitioner's first motion for leave to amend. (Petitioner's App. A13.)

Petitioner filed his first motion for leave to amend the complaint (hereinafter referred to as "the Section 1983 complaint" or "the proposed amended complaint") shortly after new counsel appeared on his behalf in the district court. In his memorandum in support of the motion to amend, he argued primarily that the court should allow him to amend his complaint because he had new counsel.[2]

By way of the proposed amended complaint, Petitioner sought to substitute Section 1983 for Title VII as his statutory basis. (Petitioner's App. A61-65, A66-71.) The

[2] Petitioner devoted approximately one and one-half pages in his initial appellate brief and one page in his lengthy reply brief before the Sixth Circuit of Appeals to the question of whether the district court had erred in denying him leave to amend.

same actions described in the first complaint as Title VII violations were characterized as violations of Petitioner's rights under 42 U.S.C. §1983.[3] The only new factual allegation was an allusion to an incident in which he found a Baghdad weather report on his mail box with a comment penned by the department chairman that was allegedly an "implicit" violation of Petitioner's first amendment rights. The proposed amended complaint did not state when this action occurred; however, the district court found in its August 5, 1987 order that the incident occurred no later than 1982 and was thus time-barred under the then-in-effect Section 1983 one-year statute of limitations. This one new factual addition would have been time-barred, even using the two-year statute of limitations which the Sixth Circuit recently found applicable in Section 1983 actions.

Petitioner additionally sought to name all Respondents in their individual and official capacities, whereas in the original complaint he had named only Professors Vezner and Doerner in their individual capacities. Finally, Petitioner sought to add a jury demand and to predicate his prayer for attorney's fees upon 42 U.S.C. §1988 instead of upon the applicable section of Title VII.

Respondents, in their memorandum in opposition to Petitioner's motion for leave to amend, discussed in some detail the various parts of the complaint that would be subject to a renewed motion to dismiss. Respondents pointed out that many, if not most, of the allegations, including the Baghdad weather report incident, were

[3] The Section 1983 complaint was, in fact, simply a "cutting and pasting" of the parts of the original complaint. Moreover, all of the acts alleged in the original complaint, and found by the Court in its February 21, 1986 order to be time-barred, were realleged in the proposed amended complaint.

time-barred by the one-year statute of limitations applicable to actions under 42 U.S.C. §1983. *See Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902, 90 L. Ed. 2d 988, *reh. denied*, 478 U.S. 1031, 107 S. Ct. 12, 92 L. Ed. 2d 767 (1986). Respondents maintained that Petitioner's allegations were insufficient to raise an issue of First Amendment proportion. Respondents also pointed out that the Eleventh Amendment barred a Section 1983 action insofar as it sought money damages against the State of Ohio and state officials in their official capacity. The Respondents questioned the good faith of Petitioner in attempting to recast his complaint more than two years after the original complaint had been filed and extensive discovery had been done. The Respondents stated, and Petitioner has *nowhere* denied, that Petitioner was not entitled to a jury trial, having long since waived that right. *See* Fed. R. Civ. P. 39(b); *Baker v. City of Detroit*, 458 F. Supp. 379, 381 (E.D. Mich. 1978), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878, *reh. en banc denied and vacated and remanded in part on other grounds*, 712 F.2d 222 (6th Cir. 1983).[4]

Petitioner has, in seeking the review of this Court, *ignored* the severe flaws which the district court noted in the proposed amended complaint. The district court in its August 5, 1987 order set forth a number of grounds for its denial: most of the factual allegations (including the one new one) were time-barred; the University and individual defendants *in their official capacities* were immune from suit. Looking at a severely flawed pleading

[4] Petitioner did nothing in response to Respondents' memorandum discussing the above summarized flaws; he did not file a reply brief suggesting that Respondents' statement of the law was incorrect; he did not submit, as he might have, a revised amended complaint which was less flawed.

which would be subject to a renewed motion to dismiss, the court exercised its discretion and denied leave to amend.

Petitioner now focuses on two aspects of the Section 1983 complaint whose filing the district court denied and which denial the Sixth Circuit upheld. He suggests that both courts below have misunderstood and/or misapplied the applicable law. Petitioner asks this Court to review, *inter alia*, the question of whether University officials can be sued in their individual capacities under 42 U.S.C. §1983 (first Question Presented by Petitioner) and whether a state university and university officials acting in their official capacities are subject to suit for injunctive relief, as opposed to monetary damages, despite the bar of the Eleventh Amendment to suits for monetary damages (Petitioner's third Question Presented). Obviously, it is well-settled law that state actors can be sued in their individual capacity in Section 1983 actions and that a court may award prospective injunctive relief against a State. Only by seriously misreading the thrust of the opinions below can Petitioner suggest that the lower courts misunderstood or misapplied these settled principles.

Petitioner suggests in his first Question Presented that the lower courts abused their discretion in not granting him leave to amend to name the University officials in their individual capacities. The district court did not hold, and obviously therefore the Sixth Circuit did not erroneously uphold, that the individual Respondents were immune from suits in their individual capacities. Of course, in a Section 1983 action, the individual Respondents would have been entitled to good faith immunity, and it is clear from the findings of facts and conclusions of law that, had the case been tried as a

Section 1983 action, the district court would have found the individual Respondents entitled to qualified immunity.[5] Thus, even had the matter gone forward against the individual Respondents in their individual capacities, Petitioner would not have prevailed. The district court, after allowing into evidence *everything* that Petitioner offered over the 20 year period of his employment at The University of Toledo, found no basis that any individual Respondent behaved other than in good faith.

In his third Question Presented, Petitioner suggested that the trial court abused its discretion by not allowing him to recast the complaint to seek prospective injunctive relief against the University and its officials. The trial court did not hold, and therefore the Court of Appeals did not erroneously affirm, that a plaintiff in a Section 1983 action may not seek prospective injunctive relief against a state university and university officials in their official capacity. There is no basis for suggesting that either of the courts below made such a determination. Had Petitioner been entitled to injunctive relief, the court had the power to issue the suitable injunctive orders with the case styled as a Title VII action. The court, having heard Petitioner's evidence of alleged slights over a twenty year period, found that Petitioner was entitled to no relief.

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[5] The district court found no discriminatory animus in the incidents involving the relationship between the Petitioner and Respondent Doerner. (Petitioner's App. A20 at Finding of Fact ¶13.) The district court found that the Petitioner's salary determinations were made in accordance with the elaborate procedural safeguards set forth in the University's Manual of Policies and Procedures. (*Id.* at ¶25.) The court found that other faculty members had been censured, reprimanded and/or fired. (*Id.* at ¶33.) The court found that, while department members were not always congenial and were competitive among themselves, department rivalry was not motivated by discriminatory reasons. (*Id.* at ¶34.)

Petitioner maintains that the Sixth Circuit's reliance on *Will v. Michigan Dept. of State Police*, _____ U.S. _____, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), in support of its finding of no abuse of discretion shows that the Sixth Circuit overlooked district court errors. This is not a fair reading of the opinion. The Sixth Circuit obviously cited *Will* to show the viability of the line of cases that the district court had relied upon in holding that The University of Toledo is the alter ego of the State of Ohio and therefore is entitled to Eleventh Amendment immunity. *Hall v. Medical College of Ohio*, 472 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 83 L. Ed. 2d 789, 105 S. Ct. 796 (1985), had so held as to another state university in Ohio. In *Will*, *supra*, this Court discussed the Eleventh Amendment bar to suits against the States. In light of *Will*, the Sixth Circuit's holding in *Hall* is clearly correct. State universities in Ohio are entitled to Eleventh Amendment immunity. In short, Petitioner's first and third Questions Presented raise no issue worthy of this Court's review.

Petitioner suggests in his fourth Question Presented that the State of Ohio has waived sovereign immunity and consented to suit in the federal courts for a violation of Section 1983. Petitioner notes that the Sixth Circuit did not consider this issue; however, he did not raise the issue and, therefore, it was not properly preserved. In any case, via Ohio Rev. Code Section 4112.01 *et seq.*, the State of Ohio has not waived its sovereign immunity and consented to suit in the federal courts under Section 1983. A state's waiver of sovereign immunity must be clear and will not be lightly inferred. A state may consent to suit only in its own courts, which does not constitute a waiver of immunity from suit in federal court. *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 622 (1974). While the State of Ohio

has waived sovereign immunity and consented to be sued in the Ohio Court of Claims, it has not consented to suit in federal court. *Ohio v. Madeline Marie Nursing Homes #1 and #2*, 694 F.2d 449 (6th Cir. 1982). Petitioner's fourth Question Presented is meritless.

Petitioner's second Question Presented concerns the proper statute of limitations for actions under Section 1983. At no time in the courts below did the parties address the issue of whether the proper statute of limitations under Section 1983 should, in a case arising in Ohio, be four years rather than the two-year statute determined by the Sixth Circuit to be applicable in its *en banc* decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989). Moreover, Petitioner's argument on this point misrepresents the holdings of the lower courts. He contends that "both courts below held that claims pursuant to 42 U.S.C. Section 1983 could not be presented if they were beyond the 300 day time bar previously applied by the District Court." (Petition at p. 10.) The district court denied leave to amend for several reasons, including the fact that the only additional fact alleged in the proposed amended complaint was time-barred, *not* by the 300-day limit of Title VII, but by the one year statute of limitations then in effect for Ohio-based Section 1983 actions. *Mulligan v. Hazard*, 772 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902, 90 L. Ed. 2d 988, *reh. denied*, 478 U.S. 1031, 107 S. Ct. 12, 92 L. Ed. 2d 767 (1986). (Petitioner's App. A51-A52.)

Petitioner contends that this ruling should be reconsidered in light of this Court's holding in *Owens v. Okure*, 488 U.S. _____, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989), and that the Sixth Circuit has improperly applied Ohio Rev. Code Section 2305.10, rather than

Ohio Rev. Code Section 2305.09, as the statute of limitations for Section 1983 actions. Even were the district court's holding reviewed in light of *Owens v. Okure*, this would not avail Petitioner. The Sixth Circuit has properly applied Ohio Rev. Code Section 2305.10, and its two year statute of limitations would still bar the only additional factual allegation in the proposed amended complaint, which occurred no later than 1982. (Petitioner's App. A50.) Ohio Rev. Code Section 2305.09, which Petitioner contends is the proper statute of limitations, is actually a general residual or "catch-all" statute of limitations. This Court rejected the use of such statutes in *Wilson v. Garcia*, 471 U.S. 261, 278, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), and in *Owens v. Okure, supra*. Ohio Rev. Code Section 2305.10 is the residual *personal injury* statute of limitations, the use of which is prescribed by *Owens v. Okure, supra*.

Clearly, Ohio Rev. Code Secton 2305.10, covering "bodily injury," is the proper statute of limitations for Section 1983 claims. Thus, the Sixth Circuit's decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989), is correct, and Petitioner's additional factual allegation would still be barred by the two year statute of limitations, since the original complaint was filed in 1985 and the additional incident occurred no later than 1982. In any case, this action would be a most inappropriate vehicle for reexamination of the *Browning* decision because the issue was not briefed in the courts below.

II. THE CONCLUSION OF THE DISTRICT COURT THAT PETITIONER'S REPRIMAND WAS NOT RETALIATORY AND THE SIXTH CIRCUIT'S AFFIRMANCE PROVIDE NO BASIS FOR REVIEW BY THIS COURT.

Petitioner's final Question Presented, which expressly seeks review of the purely factual determination of the two lower courts that the reprimand was not retaliatory, is not worthy of any lengthy discussion. Petitioner does not dispute the extensive testimony presented at trial as to the limitations that were placed upon him because of his history of continually raising old grievances previously found meritless by University grievance bodies comprised of his peers. Nor does Petitioner dispute that, prior to the issuance of the reprimand, he had been warned against continued disruptive behavior by Driscoll, University committees and his department. The only two arguments Petitioner was able to fashion in the face of the extensive trial testimony—that his memorandum regarding Professor Doerner was "a protected expression of concern" and his reprimand was 'inherently retaliatory"—were rejected by both lower courts. The district court held that "the letters of reprimand . . . were the result of Petitioner's refusal to follow the guidelines and University procedure and not because Petitioner was utilizing Title VII procedures." (App. A25 at ¶37.) The Sixth Circuit, noting the "substantial evidence in the record of Al-Marayati's conduct," concluded that the trial court did not err in its decision that the adverse employment decisions were not retaliatory. (App. A10.) The "exceptional circumstances" required before this Court will review a factual determination are not present and the Petition is not reviewable on this basis. *See, e.g., NCAA v. Board of Regents,* 468 U.S. 85, 98 & n.15, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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